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**REPORTS**  
**OF**  
**C A S E S**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPERIOR COURTS OF LAW**  
**IN THE**  
**STATE OF SOUTH CAROLINA,**  
**SINCE THE REVOLUTION.**

---

**BY ELIHU HALL BAY,**  
**ONE OF THE ASSOCIATE JUDGES OF THE SAID STATE.**

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Second edition, with additional notes and references, &c.

**VOLUME I.**

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**NEW-YORK:**

**PRINTED AND PUBLISHED BY I. RILEY.**

**FOR SALE BY E. MORFORD, WILMINGTON & CO. CHARLESTON;**  
**SEYMOUR & WILLIAMS, SAVANNAH; LEWIS ADAMS,**  
**RICHMOND; COLE & THOMAS, BALTIMORE; P.**  
**BYRNE, PHILADELPHIA; R. M'DERMUT, AND**  
**S. GOULD, NEW-YORK; JOHN WEST, & CO.**  
**BOSTON; DANIEL JOHNSON,**  
**PORTLAND.**

.....  
**1809.**

DISTRICT OF SOUTH-CAROLINA, TO WIT :

**B**E IT REMEMBERED, That on the twenty-first day of August, anno domini one thousand eight hundred and nine, and in the thirty-fourth year of the Independence of the United States of America, the honourable ELIHU HALL BAY, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit :

“ Reports of Cases argued and determined in the Superior Courts of Law in the State of South-Carolina, since the revolution. By Elihu Hall Bay, one of the Associate Judges of the said State. Second edition, with additional notes and references, &c. Volume I.”

IN CONFORMITY to the act of the Congress of the United States, entitled, “ An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned ;” and also to an act, entitled, “ An act, supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints.”

JAMES JERVEY,

Federal Clerk, South-Carolina District

94460

## PREFACE.

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A PROPER collection of the most remarkable decisions in our courts of justice since the revolution, is of such obvious utility, as to preclude the necessity of an apology for laying such a work before the public. This consideration, added to the earnest and reiterated wishes of many of our intelligent citizens, as well as the gentlemen of the bar, to procure this species of useful and interesting information, induced the compiler to publish the following *Reports of Law Cases*, which have been determined in the Supreme Courts of this State since the above memorable period.

It has been a principal object with him to prevent the unnecessary bulk, and consequent expense of this work, by selecting from the great mass of cases, only such as were recommended by the novelty and importance of the principles and topics they involved; or such as tended to the enlargement and stability of our system of jurisprudence. Although many of these cases may be similar to numbers which may be found in the books of the *English* reporters, (and which continue to be of authoritative influence in our courts,) yet they derive a confirmatory, and more indisputable weight, when they are known to have received the decided and concurrent sanction of our courts of judicature; and become more generally im-

pressive from the recentness of the decisions, and the more immediate knowledge of the parties and circumstances.

He has classed them in the order of time they were determined, as nearly as he possibly could; but where he could not ascertain the term or date exactly, from the remote districts, he has placed them under general heads, as will appear by the running title of the book; except a few cases towards the end of it, which however, refer to the different years under which they ought to have been placed. The first general head will be of cases determined from 1783 to 1790, inclusive; and annually afterwards, as they occurred.

Amidst the diversity of opinions which have prevailed, respecting the most proper mode of reporting, it has been very difficult to fix upon any one, which will not be exposed to objections. The reporter, therefore, does not flatter himself that his method will meet with entire approbation; he trusts, however, that he has a claim to a considerable share of indulgence. Several circumstances, he hopes, will ensure this, independently of its being the first work of the kind ever published in *South-Carolina*. Among others, it is well known, that he has been very much occupied, ever since his public appointment, by the arduous duties of his office: so that he has had very little leisure to devote to an undertaking of this sort. And he must add, that except from one or two gentlemen, occasionally, he has had very little aid from the communication of briefs, and other documents, which have contributed to perfect the labours of other persons, who, in other places, have distinguished themselves in this line. He is therefore very sensible that many errors and imperfections will be discovered,

## PREFACE.

both in his manner and matter, which neither his time nor diligence, could guard against or prevent. In the cases which this volume contains, he has not attempted to give a minute or particular detail of the arguments of the counsel, concerned on each side :— the utmost he could do, consistently with proper limits, was, to furnish (as he trusts he has done) a faithful sketch or summary of them : which may suffice for the ends and designs he had chiefly in view ; but which, he is sensible, will be very far from doing justice to their ingenuity or eloquence.

With respect to the judgments of the courts, he is confident that he has stated them always with fidelity and accuracy ; although he has not always been able to give fully, the reasons upon which they were founded. Where there has been occasionally any difference of sentiments on the bench, or where the novelty and importance of the points decided, made it proper, he has given the opinions of the judges *seriatim*, as they were delivered. In many cases, he has been enabled to do this in their own words ; and where this could not be done, (on account of their being lost or mislaid,) he has given the substance of them, as correctly as he could, from his own notes.

He is sorry that it was not in his power to have comprised in this volume, any decisions later than the year 1795 : he found this however impracticable, without reporting in a very crude and imperfect manner, many new and important cases, which since that period have been decided. And upon a review of this volume since it has been prepared for the press, he has discovered that a number of cases of considerable moment, have been passed over, which escaped his researches in the course of the present compilation. All these, with

## PREFACE.

others which are now depending, may probably form the contents of a subsequent volume, so as to bring our adjudged cases down to this time, should the present meet with an encouraging reception.

If this work should be found not to be devoid of that authenticity, which ought to be in every one of the kind, its most essential characteristic; he relies upon the candour and liberality of the profession, and the public in general, in excusing any omissions or errors which he may be chargeable with, and which may be developed by them in the course of their perusal and examination of it. At all events, whatever may be the fate of it, the publisher is emboldened to hope, that the fostering patronage of an indulgent public, which he has so liberally experienced, when he first engaged in the undertaking, may excite the spirit and assiduity of some other person, more adequate to the task, to take up and continue the publication of our most important judicial determinations, in a much more improved and extensive manner, than he has been enabled to do in this his first attempt as a reporter: that this kind of beneficial knowledge, may become more generally diffused among all classes of our fellow citizens.

*N. B.* Since the publication of this volume, a second one has been prepared for the press, and will shortly be published; consisting of cases determined in the Constitutional Court of Appeals, in the State of *South-Carolina*, subsequent to the year 1795.



*Judges of the State of South-Carolina, at the respective periods when the following cases were adjudged and determined.*

HENRY PENDLETON, EDANUS BURKE, THOMAS HEYWARD, and JOHN FAUCHEREAUD GRIMKE.	} Associate Judges in 1783.
--	--------------------------------

ALEXANDER MOULTRIE, Attorney-General.

THOMAS WATIES was appointed in 1788, upon the death of Judge *Pendleton*.

WILLIAM DRAYTON was appointed in 1789, upon the resignation of Judge *Heyward*; but soon after accepted of a seat on the federal bench.

JOHN RUTLEDGE was appointed Chief Justice on the 16th of *February*, 1791, and continued in office till 1795, when he was promoted to the Chief Justiceship of the *United States*.

ELIHU HALL BAY was appointed the 19th of *February*, 1791.

JOHN JULIUS PRINGLE was appointed Attorney-General in *December*, 1792, vice *Alexander Moultrie*, resigned.



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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURTS OF COMMON PLEAS**  
**AND**  
**GENERAL SESSIONS OF THE PEACE, &c.**  
**FROM**  
**THE YEAR 1783 TO THE YEAR 1790,**  
**BOTH INCLUSIVE.**

---

**The STATE *against* LEWIS.**

**THE** prisoner *Lewis* was charged with horse-stealing, and committed to prison for the offence, on the day previous to the session of the court. The grand jury having found a bill against him, he was brought into court and arraigned, and upon being asked if he was prepared for his trial, he answered in the negative. His counsel then moved to postpone his trial, upon an affidavit of the absence of some material witnesses, which was opposed by the

*Attorney-General*, as having a tendency to establish a precedent of a very dangerous nature. He went at large into the nature and frequency of the offence; the necessity of putting a speedy and effectual check to it; and urged, that if prisoners were permitted to postpone their trials on their own affidavits, in the manner moved for, scarcely one in ten would be brought to justice. It was easy to foresee,

*Camden, November Sessions, 1783.*

Where a prisoner has been committed to gaol for a capital offence, only a short time previous to the sitting of the court, or during the session, so that he could not be prepared for his defence; in such case the court will postpone his trial, in order to give him an opportunity of procuring his witnesses.

1788.

The State  
v.  
Lewis.

he said, that every man accused of horse-stealing, might make in future a simple affidavit, and by that means, and from the circumstances of the Circuit Courts being held only twice in the year, would gain six months' indulgence. In the interim, as there was scarcely a secure gaol in the country districts, he might, with the assistance of confederates, effect his escape, and thus elude the justice of his country.

The counsel for the prisoner answered, that the present motion was an appeal to the justice of the court, not to hurry a fellow-citizen prematurely into a trial, which might affect his life, without granting him every opportunity of being thoroughly prepared for his defence. Having been committed only one day before the commencement of the session, it was improbable that he should be ready for trial: and particularly when he had deposed that several witnesses, who could make his innocence appear, were at such a distance, as to have rendered it impossible for him to have had their testimony in due time. With regard to the reasons urged against the dangerous tendency of the precedent, they applied with equal force on behalf of the prisoner: for public justice, and the rights of humanity, required that every citizen (whom the law presumed innocent till found guilty) should have a fair and impartial trial, and every reasonable indulgence allowed him, to procure his witnesses. That there was no crime so great, no proceedings so instantaneous, but what the Court would, upon reasonable grounds, grant this motion. *Black. Rep.* 514. It was very much a matter of course in civil cases; and if so in matters of property, the rule would, *a fortiori*, hold much stronger in capital cases affecting a man's life.

GRIMKE, J. was of opinion, that upon the grounds urged by the prisoner's counsel, and for the reasons set forth in the affidavit, the trial ought to be postponed. He observed, that there was a great difference between the case of a prisoner who had been committed only a day or two pre-



vious to the sitting of the court, or during its session, and who, for the reasons mentioned, could not be supposed to be ready for trial ; and that of one, who had sufficient time to summon his witnesses, and be fully prepared. The rule of law for putting off trials, was the same in criminal, as in civil cases. And the Court never would hurry on an unfortunate fellow-citizen to a trial, without giving him a reasonable time to prepare for his defence, however dangerous the nature of the offence might be, of which he stood accused. And relied on the case of Lord *Kilmarnock* and others, *Fost.* 2. as in point on this head.

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The trial was accordingly put off, till the ensuing court of sessions.

*Note.* Although the above is only a *Nisi Prius* case, yet it has ever since been relied on as a case in point, in all cases of a similar nature.



FLEMMING *against* BALL.

January,  
1784.

THIS was an action for an assault and battery. The cause came on to be tried before a special jury in *Charleston*, at a special court, under the act of assembly, authorising such courts, before Judges PENDLETON and BURKE.\*

A master of a ship may give moderate correction to mariners, if they misbehave, or neglect, or refuse to do their duty. But if he beats them cruelly, or makes use of improper weapons, he is answerable in damages.

On the trial it appeared, that the plaintiff was a seaman, and had shipped himself as such, on board the ship *Britannia*, commanded by the defendant. He signed articles in *London* on a voyage to this place, and from hence to

\* An act of assembly, formerly of force in South-Carolina, allowed the judges to hold special courts in civil cases, in vacation time ; and to draw special juries and issue *venires*, &c. in cases where transient persons were interested or concerned, for the speedy administration of justice, in which it was usual for as many of the judges to preside, as could conveniently attend ; but that act has been repealed.

1784.


  
Flemming  
v.  
Ball.

return again to *London*. During the voyage he had conducted himself as an orderly and well disposed mariner. Shortly after the arrival of the ship here, while she was taking in her cargo, the plaintiff and others having laboured hard during the day in stowing away rice, went in the afternoon to the mate, and asked for grog. The mate answered, that he had none at his disposal, and referred them to the captain; upon which the defendant and one *Eastbury*, went down into the cabin to make their application. Captain *Ball*, the commander of the ship, being busily engaged in writing, on perceiving them, got into a violent passion, and took up an iron poker then in the fire-grate, and beat them both severely; so much so, that the plaintiff, *Flemming*, was disabled for a considerable time afterwards. It appeared also in evidence, that *Eastbury*, the other mariner, was in liquor, and behaved rather rudely, but *Flemming* was sober, and had behaved himself with civility.

*Pinckney*, for the defendant, urged that subordination on board of a vessel, was essentially necessary; and unless seamen were kept in due and proper order, commerce could never be advantageously carried on. The safety of the ship, the lives of the passengers, and the protection of all on board, equally required it. That mariners were naturally a rough and turbulent set of men, and required curbing and restraint more than any other class in the community. It was for this reason that the marine laws have, time out of mind, permitted masters of vessels to correct unruly and disorderly sailors, and oblige them to do their duty. That the common law of the land had adopted the marine laws, as part of the law of nations; so that it was incorporated into the principles of our constitution: besides, the cabin of a ship is the sanctuary of the captain; as much so, as a house is that of its owner: and no person has a right to enter it without his permission, no more than a stranger has, to enter into another man's dwelling without leave of access being first given, (which probably gave rise to the common custom of knocking at the door of a dwelling-house, before

entry.) If the plaintiff had wanted any thing from the captain, he ought, in decency, to have sent in a message by the steward of the ship, and not have rudely entered it himself. To support the power and authority of masters on board of their vessels, the counsel relied on *Vin. Abr. tit. Mariners*, 241. 12 *Mod.* 434. 3 *Bac.* 566, 7.

1784.

  
Flemming  
v.  
Ball.

*Bay*, for the plaintiff, conceded that the general doctrine contended for by the defendant was good, and that a master on board of his ship may, if a sailor behaves rudely, or refuses to do his duty, give him moderate correction, which might well be compared to *master and servant, tutor and scholar*, and all other persons in superior and subordinate stations ; but this general power will not justify any cruelty or outrageous beating. And if a master of a ship, or other person, abuse this power and authority, then he is no longer justifiable, but becomes an aggressor, and is answerable in damages to the person injured. In the present case, however, it did not appear that the plaintiff had misbehaved, or refused or neglected to do his duty. He had been working hard during the day, and asked the mate civilly for grog, who referred him and others to the captain, in the cabin. The only offence, therefore, (if it can be called one,) was his going into the cabin, to speak to the captain, and then he behaved well, (though *Eastbury*, who was with him, did not.) If the captain had ordered him out, and he had refused ; or if he had been insolent, it might have justified captain *Ball*, in making use of moderate force, to compel him to leave it. But, on the contrary, it appears that he made use of a very improper weapon, and beat the plaintiff most unmercifully. That seamen were a highly useful set of men, well worthy of the protection of the laws of their country ; and as, on the one hand, they were much in the power of their commander, so, on the other hand, they were well entitled to every possible security against ill usage.

*The Court* ruled, that the law authorises the master of a ship to give his mariners moderate correction if they mis-

1784.

Flemming  
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Ball.

behave, or neglect, or refuse to do their duty ; and that he may justify in an action of assault and battery. But if he exceeds the bounds of moderation, and makes use of unreasonable or dangerous weapons, he then becomes responsible to the mariner, in damages. That although the cabin of a ship is peculiarly appropriated to the use of a commander, yet if a mariner enters peaceably into it, and upon a lawful errand, it will not justify an outrage upon him. Whether there was a peaceable entry, or whether the weapon used was a proper one or not, were matters for the Jury to consider, and they would govern themselves accordingly.

Verdict for plaintiff, 5% damages.



January  
Term, 1784.

GENAY *against* NORRIS.

A physician or other person, putting cantharides into a glass, tumbler of wine, or other vessel, and prevailing on another to take the draught, is liable to vindictive damages.

SPECIAL action on the case. The defendant, who was a physician, and others, living at or near *Jacksonborough*, one evening, after drinking freely, got the plaintiff, *Genay*, who was a foreigner, and then in company, intoxicated ; and it was so contrived, that the defendant and plaintiff should quarrel, and in order to adjust this quarrel, pistols were introduced, and, by the connivance of those who acted as seconds in this sham dispute, powder was fired off at each other ; after which, the parties were prevailed on to make friends. As soon as this pretended reconciliation took place, it was proposed that the disputants should drink a glass of wine together, when it appeared that the defendant contrived to put into the plaintiff's glass or tumbler, a large potion of cantharides, or some preparation made from them, which the plaintiff, in his agitation, (for he was the only person who thought the altercation serious,) drank off. He then went home, and was soon after seized with very acute pains ; upon which he sent to Doctor *Wallace*, a neighbouring physician, who declared on the trial, that

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7.

when he first saw his patient, he found him in extreme and excruciating pain, from the quantity of cantharides he had drank, and remained so for near a fortnight, and that he was not free from the effects of the potion for several months after.

1784.

Genay  
v.  
Norris.

This was a case which required little or no comment; of course little was said by the plaintiff's counsel on the subject.

On the part of the defendant it was urged, that the whole transaction was nothing more than what is usually termed a drunken frolic, and no injury was seriously intended. That the defendant mistook the quantity poured into the glass; that he did not put so much, he thought, as would by any means injure him.

*The Court*, in charging the jury, told them, that this was a very wanton outrage upon a stranger in the country. That notwithstanding it was called a frolic, yet the proceedings appeared to be the result of a combination, which wrought a very serious injury to the plaintiff, and such a one as entitled him to very exemplary damages, especially from a professional character, who could not plead ignorance of the operation and powerful effects of this medicine.

Verdict for plaintiff, 400%. damages.

January  
Term, 1784.

JENKINS against PUTNAM.

Condemnation of property, taken as prize, in a court of admiralty, precludes a court of common law from going afterwards into the consideration of the legality of it.

The proceedings and adjudications of foreign courts and in the *United States*, must have all due faith and credit here.

But if there has been no condemnation in a court of competent jurisdiction, then the whole of the case is open for investigation by the common law rules.

THIS was an action of trover, tried at *Charleston*, in *January* term, 1784, before a full bench.\* A privateer, it seems, was fitted out in *North-Carolina* during the late revolutionary war, and in the course of a cruise against the enemy, the crew landed on *Edisto-Island*, while it was under the protection and jurisdiction of the *English*, took away a number of negroes, the property of *Jenkins*, the plaintiff in this action, and carried them to *Washington*, in *North-Carolina*, where they were condemned in a court of admiralty there, and sold as the property of the *enemies* of the *United States*, or their *adherents*.

For the plaintiff, it was contended, that this taking was unauthorised by the rules of war. The commission given to the privateers, being to cruise and capture the property of their enemies on the high and open seas, does not make any capture of property on land, legal. The plaintiff was an *American* citizen, whose property was not liable to capture, or condemnation, although he had been compelled by conquest, to submit to the jurisdiction of the enemy, and to live under their protection at the time when these negroes were taken off. And that if the capture was unlawful, not authorised by the rules of war, or laws of nations, no condemnation in a court of admiralty could legalize such seizure.

For the defendant it was urged, that captures made on land, by the seamen from on board of a ship or vessel of war, by the aid of their boats, had always been deemed lawful seizures from an enemy; as much so, as if taken on the high seas. The case of the captures made by Lord

\* It was formerly customary in *South-Carolina* before the great press of business rendered it impracticable, for all the judges to sit on the trials of cases before a jury in *Charleston*, or at least as many as could with convenience attend; for which reason, very few cases, in the early period of the judicial proceedings, were taken up before the adjourned courts for reconsideration.

*Anson* on the coast of the *South Seas*, was relied on ; where it appeared that the seamen and mariners from on board of the ships, landed in their boats, and sacked the city of *Quito*, some miles from the sea-coast, and took away treasure to an immense amount. This property was afterwards reclaimed in *England* by the *Spanish* court, who complained of this landing and plundering a city, as an infraction of the law of nations ; nevertheless, the whole was deemed a lawful prize. The case of Admiral *Vernon*, at *Porto Bello* and *Carthagen*a, was also mentioned as in point ; also, the case of Admiral *Pococke* at the *Havannah*, &c. It was further contended, that persons living with, and under the jurisdiction of an enemy, taking a commission and *aiding* and *assisting* them, were considered as *associates* in war ; and liable to be treated as such. *Vattel*, p. 27. 33. 95. *Burlemaqui*, 279. And that although part of the country had been reduced by the enemy, yet those who were firm and attached to its interests, could have joined their countrymen in arms, if they had thought proper, and assisted in driving off the invaders ; or have remained quiet at home, without taking up arms for them. With respect to the negroes taken, it was the duty of the plaintiff to have interposed his claim as an *American* citizen, in the court of admiralty in *North-Carolina*, which was a court of competent jurisdiction. And if it had been found good, it would have been sustained. His not doing it, was a tacit admission of the legality of the capture. That at all events, the sentence of the court of admiralty in *North-Carolina*, would operate as a bar to this action. The only constitutional review of the case, which could have been had, would have been by appeal. And it was the plaintiff's own fault, that he had put it out of his power to appeal. By the act of confederation, the judicial proceedings of one state, had due faith given to them in others ; and the acts and proceedings of one court of competent jurisdiction, were not to be questioned in any other, where no appeal had been made. This is the case even between nations not con-

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federated, and in cases too manifestly unjust. 2 *Ld. Raym.* 935, 936. *Curth.* 31. 1 *Atk.* 49. If this, then, is part of the law of nations between foreigners, not connected with each other, the reasoning will be much stronger between friendly associated states, bound by a solemn agreement, to give faith and credit to the proceedings in the courts of justice of each other.

*Per Curiam.* We shall not go into the first and second grounds urged by the defendant in his defence, but take up this matter on the last ground ; the two first being very proper for the consideration of the *prize court*, in which the property was libelled, or a court of appeals, if an appeal had been made ; as they involve in them the question of *prize*, or *no prize*, which exclusively belongs to the admiralty jurisdiction.

This court is bound by common law rules ; and its decisions must be squared by those principles only. What are the leading features in this case ? Why, that property has been taken, supposed to be enemy's property, and libelled in a court of admiralty, and condemned ; which sentence changed and transferred it from the original owner to the captors. Shall this court, then, go into a consideration of all the circumstances of this case ? If they did, it would be trying the legality of the capture over again. We have no such power. We are bound by the sentence of the court of admiralty in *North-Carolina*, until reversed by some competent authority, and are obliged to give due faith and credit to all its proceedings. The act of confederation is conclusive as to this point, and the law of nations, is equally strong upon it. 2 *Ld. Raym.* 935, 6. *Curth.* 31. 1 *Atk.* 49. If, indeed, the property had been carried off, and there had been no condemnation in a court of competent jurisdiction, then the whole circumstances of the case would have been open for a full investigation, agreeable to the principles of the common law. And if there had been no legal divestment of property, the plaintiff might have supported his action. Or, if the negroes had returned within the jurisdiction of the state of *South-Caro-*



*lena*, before condemnation, the *jus postliminium* might have applied, and the original owner might have been restored to his property again. But as the case now stands before the court, the defendant is certainly entitled to a verdict.

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Jenkins  
v.  
Putnam.

Jury found for defendant accordingly.

WHITE *against* M<sup>c</sup>NEILY and others.

George Town,  
April Court,  
1784.

TRESPASS for entering plaintiff's plantation with others, and taking out of his dwelling and out-houses, household furniture, horses, and other articles, to the value of 1,000*l.* sterling. It appeared in evidence, that the defendants were present with a party of men, who had joined the *British*, in *September*, 1780, when the plaintiff was plundered of household furniture to a considerable amount, several of his horses taken away, and his dwelling-house burnt.

Where there are joint trespasses, a jury may sever damages, and apportion them according to the degree and nature of the offence committed by each offender.

For the defendant *M<sup>c</sup>Neily*, several witnesses were called, particularly *Alexander Scott*, *William Floyd* and *David Lee*, who all testified that he was made a prisoner himself in his own house, compelled to deliver up his arms, and from thence was carried a prisoner to the plaintiff's plantation, and there remained under a guard during the whole time the house and plantation were plundered. That he did not interfere or receive any part of the property so plundered or taken away; on the contrary, that he was carried a prisoner from captain *White's*, the plaintiff's plantation, to *Britton's Ferry*, fifteen miles distance, and from thence to major *James's* plantation, ten miles further, and there discharged, and permitted to go home, after being three days a prisoner with the party.

It was, however, proved, that in *November* following, he joined the *British*, and went into the garrison at *George-Town*, and did duty as a militia man in their service. From

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White  
v.  
McNeily and  
others.

this circumstance principally, the jury were induced to doubt the principles of this defendant while a prisoner at the plaintiff's plantation, and considered him as an aider and abettor of their proceedings there. *Graham* and *Edy* were of the party who plundered the plaintiff, and therefore they gave plaintiff a

Verdict for 400*l.* against *McNeily*; 200*l.* against *Graham*; and 100*l.* against *Edy*.

As this was the first case of trespass after the war, in which a jury severed and apportioned damages, it was at first doubted as a deviation from the old common law rule of joint trespassers, who being all equally guilty in the eye of the law, it was supposed jury could not sever. But afterwards, upon mature consideration, the point was given up, as it would be the means of preventing a multiplicity of suits, and at the same time put it in the power of the jury, to apportion at once the quantum of damages, agreeable to the degree of guilt of each trespasser. And it has since been relied on as a precedent.

*N. B.* This case has been relied upon ever since the determination at said town, and the principle of severing damages in joint actions according to the degree of injury committed by each defendant, and his ability to make compensation, has been sanctioned by the judges, as a correct and just one in all similar cases, down to the present day. It may, therefore, be considered as part of the common law of *South-Carolina*.—See the case of ———— v. *Mary Lingard and others*, vol. 2.

EVANS *against* HUEY and FRANKLIN.Camden, November Court,  
1784.

CASE on a note of hand. *Duress* pleaded. The witnesses proved, that some time previous to the date of this note, *Evans* and *Huey* had a quarrel, on which *Huey* stabbed *Evans* with a knife in several places ; and although none of the wounds proved mortal, yet they disabled *Evans* for several weeks. That some time after *Evans* recovered, he went with a party of men armed, in quest of some horse thieves, who were supposed to be in the neighbourhood. That while they were out, they stopped at *Huey's* house at a late hour of the night, and insisted upon his getting up and opening his doors ; which was done, with some reluctance. When they got admittance into the house, it was proposed to *Huey* that he should accommodate the difference with *Evans* that night, by giving his note for 28*l.* sterling. A conversation then took place between the parties, and *Huey* at length agreeing to the proposal, gave his note accordingly. *Evans* and the party staid till morning, when they all went to the house of *Franklin*, the other defendant, at a mile's distance ; who being *Huey's* neighbour, signed the note, and became his security for the money. This was, therefore, a suit to recover the amount of the note given under these circumstances.

Where plaintiff and defendant had a previous quarrel, the plaintiff's going to defendant's house afterwards, in the night, with an armed party, and proposing a settlement of the difference, (though no actual threats were made use of, and a note given in consequence of this proposal, with security) yet this shall constitute a *duress*, both as to the principal and his security.

*Pinckney*, for defendant, argued, that this was such a *duress* as would vitiate the contract. That an armed party going in the dead of night to a man's house, demanding an accommodation of this kind, and especially as *Evans* was much enraged against him, was sufficient to awaken his fears, and terrify him into any contract ; and, therefore, it was not of that free and voluntary nature, as deserved the sanction of a court of justice.

*Pringle*, for plaintiff, contended, that in this case no force was made use of, or threats thrown out to alarm the defendant, *Huey*. That *Evans* was free to propose, and the defendant equally so, to assent to or refuse the proposal, as

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Evans  
v.  
Huey and  
Franklin.

he thought proper. That he had received an injury by the stabbing, and was certainly entitled to a compensation. If the parties preferred to accommodate their difference in this manner, without the expense of a law-suit, it did not amount to a *duress*, either for *fear of life, imprisonment*, or even *loss of goods*; and, therefore, it was such a contract as deserved the support of the law in its favour. That at all events, even if it could be objectionable as to *Huey*, it was not so as to *Franklin*, the other defendant; for he signed it *voluntarily* in the morning, when he could be under no restraint or apprehension; and as the note was joint and several, the plaintiff was entitled to a recovery against him.

PENDLETON, J. charged the jury, that no evidence was before them to prove, that actual threats were made use of: yet, the circumstance of the plaintiff's demanding entrance, and coming into the defendant's house with an armed party, and that, too, not long after he had received an injury from *Huey*, who must have been aware of the plaintiff's indulging a resentment against him; this circumstance, he said, was sufficient to have awakened any man's apprehensions, who might be placed in a similar situation. He thought, therefore, that any note or bond given, or contract made, when one of the contracting parties must evidently have been under these apprehensions, did not deserve the countenance of a court and jury. As to the liability of the other defendant *Franklin*, who signed as security for his neighbour *Huey*, under an idea that the contract was a valid one, if it was void against *Huey*, it was void against *Franklin* also.

Jury found for defendants.

The Administrator of WHITAKER against ENGLISH.

Camden,  
April Court,  
1784.

TRESPASS for entering the deceased *Whitaker's* plantation, and taking away sundry negroes, horses, cattle, hogs, corn, &c.

The defendant, it seems, was one of those deluded citizens of *America*, who joined the *British* army in the late war, and accepted a commission in their militia service. In the year 1780, he went, or was sent with a party of men under his command, to the house of the deceased *Whitaker*, and took away the above articles to a large amount, and carried them off to the *British* garrison then at *Camden*. On the trial it was admitted, that he was only a subordinate officer, and acted by the orders of his superiors in command: and further, that no part of the property taken away, was appropriated to his private emolument, but carried to the use of the *British* army; and, therefore, as he was compelled to do what he did, it was said, it would be unjust to make him responsible. But

In treasons and trespasses, the highest and lowest offences, there are no accessories. All are principals; and all and every of them are liable for the whole amount of the injury done.

The definitive treaty of peace with Great Britain, only exempts persons from criminal prosecutions for offences against the state; not from civil actions for damages sustained by private individuals.

GRIMKE, J. held, that in treasons and trespasses, the highest and lowest offences, there are no accessories or subordinate offenders. All are principals; and wherever men go to do an unlawful act of this kind, all and every of them are liable to the full extent; though where several are sued, a jury may apportion as they think just and proper. (a) It is immaterial to what purpose the goods were applied; the injury to the deceased's estate was the only point for the consideration of the jury.

(a) See the case of *White v. McNeily* and others, ante, page 11.

The definitive treaty of peace, in 1783, between *Great Britain* and this country, was next urged in behalf of the defendant; and it was contended, that the fourth clause of the treaty, which says "There shall be no future confiscations or prosecutions, for any thing done during the war," exempted the defendant from responsibility.

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Adm'r of  
Whitaker  
v.  
English.

But, said the judge, it has been decided over and over again, that the exemption in that article of the treaty only relates to criminal prosecutions at the suit of the state, for treasons, murders, trespasses, misdemeanors, &c. It does not exonerate or excuse persons from damages in civil suits, wherever they had injured their neighbour.

Verdict for plaintiff, 800/.



COOKE *against* RHINE.

Where damages accrue by non-performance of a contract for building a house within a certain time, a defendant may, under our discount law, give them in evidence against plaintiff's demand for work, labour, and services performed in building, &c.

ASSUMPSIT for work and labour, in rebuilding a house.

Mrs. *Rhine*, the defendant, having lost her house in one of the destructive fires which raged in *Charleston* a short time before, or during the late war, applied to the plaintiff, *Cook*, who was a master-builder, for an estimate of the expense of rebuilding it; as also for an account of the time it would require before it could be completed; which the plaintiff furnished her with, and an agreement was concluded between them accordingly. The plaintiff, however, delayed the work much beyond the time proposed, and charged more than the estimate delivered in; for which reason the defendant, by the advice of her friends, refused to pay what she conceived an extravagant bill; and against this bill filed a discount, for the loss of rent she sustained by the plaintiff's unreasonable delay, to the amount of 220/ sterling.

See the act of assembly allowing mutual debts to be set-off in discount against each other.

*Pringle*, for plaintiff, objected to this discount. He argued, that the *discount law* only extended to *liquidated accounts*, and not to matters *sounding* in damages, as in the present case. That if the defendant had sustained a loss by the plaintiff's delay, she had her action, which was her proper remedy. In the present case, she had assessed her own

damages, and decided that a breach of contract had been committed by the plaintiff; and even admitting a breach had been committed, it was a rule of law, that *independent* covenants could not be *set off* against each other. *Loft.* 198. *Bull. N. P.* 163. The parties must pursue their mutual remedies by suit. The breach of covenant on one side, is no excuse, and cannot be pleaded on the other. *Doug.* 665. In *Cowp.* 56. it is laid down, that *damage* cannot be pleaded by way of discount. He next insisted, that to allow such kind of discounts to be set up, would tend exceedingly to confuse juries, by intermingling a variety of issues. He quoted a case of *Saxby v. Harvey*, where a discount of trespass on lands was pleaded to debt on a bond, and overruled and rejected by the court.

*Pinckney*, contra. Our discount law is much more extensive, and embraces a greater variety of cases, than the *English* act of parliament for *setting off* mutual debts. That act narrows down the grounds of set-off, to *mutual debts* only; whereas our act of assembly, permits *any cause, matter, or thing, in the defendant's own right, to be set off*. There is, therefore, a wide difference between them; and for that reason, few of the adjudged cases, in *England*, will apply here. The cases cited, he admitted, would be good law in *Westminster-Hall*, but not so in *South-Carolina*. As to sending different issues to the jury, it is every day's practice so to do. When an account is pleaded in discount to a note or bond, the jury are obliged to judge of the value of the goods; this, then, is an *unliquidated* demand. But what makes it proper to suffer this discount of the defendant's to go to the jury is, that it is a *matter springing out of the very contract itself*, on which *the plaintiff has commenced his action*. It is connected with it. The contract was, that the work should be done at a *certain* price, and within a *fixed period*; but it was not done within the time limited, consequently a loss accrued to the defendant by this delay; for rents, in the year 1783, were extravagantly high. The great question, therefore, for the consideration of the court

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v.  
Rhine.

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Cook  
v.  
Rhine.

is, shall the defendant deduct the loss sustained, out of his, the plaintiff's, demand against her, or shall she be turned round and compelled to bring her action? Certainly the former remedy is preferable. It is a short and effectual way of doing justice between the parties, to suffer the whole case to go to the jury. To refuse it, would be doing justice by halves. It would be garbling the cause, create delay, tend to multiply law suits, and increase expense. This case, he urged, cannot be assimilated to that where trespass was pleaded to a bond. They are two distinct things, and no wise connected with or relating to each other.

BURKE, J. thought that the admission of the doctrine contended for by the defendant's counsel, might have a tendency to introduce different and very opposite issues, which might embarrass both courts and juries exceedingly; and accordingly charged the jury to reject the discount.

HEYWARD, J. was of a different opinion, and thought it a very proper matter for the consideration of the jury in this case.

GRIMKE, J. concurred with him; observing, that this was a case of considerable importance; and although the doctrine might be very extensive in its operations and consequences, he thought it would be at all events beneficial, in preventing a multiplicity of law suits. He had not a doubt remaining on his mind, but that the discount law of the state embraced the case before the court, and was, therefore, clearly for admitting the discount to go to the jury.

The parties then went into the examination of witnesses, and a balance was eventually found for plaintiff, to the amount of 79% after allowing a sum for the loss of rent occasioned by the delay in not finishing off the house.



LIBER and Wife *against* The Executors of PARSONS.January  
Term, 1785.

ACTION of covenant brought for a breach of warranty, in a common release for a lot of land in *Charleston*. The case was this: the defendant's testator, *Parsons*, in his lifetime, sold to *Alexander Burn*, the father of the plaintiff's wife, a lot of land in *Charleston*, which he had purchased at a sheriff's sale. *Burn* soon after died; and the lot came to Mrs. *Liber*, his only child, by *descent*. *Patrick Hinds*, who had lands adjoining, upon running his lines, took in about two-thirds of the lot in question, and that in a diagonal direction, which ruined the shape of the remainder of the lot, and rendered it unfit for any valuable improvement. He afterwards brought his ejectment, and evicted *Liber and wife* out of the part he claimed. Upon which, the plaintiffs brought the present suit, upon the breach of the covenant of warranty in *Parson's* release. The quantum of damages was, therefore, the only point in dispute.

The value of lands at the time of *eviction*, is the true rule of estimating damages, and not the consideration money at the time of purchase.

Jury may either apportion the damages, according to the extent of the injury sustained, or give the full amount, so as to rescind the contract *in toto*, according to the circumstances of the case.

*Pinckney*, for defendants, observed, that, as executors, they could not estimate damages themselves, but were obliged to stand this suit, in order that they might be ascertained by the verdict of a jury. He said the rule for estimating the damages in a case like this, was the consideration money paid and mentioned in the release; which, when depreciated, amounted to 56*l.* sterling, with interest from the date of the deed, 1778, to the time of the verdict. He also contended, that as *Hinds* did not recover the whole lot, damages ought to be given only for the part recovered.

*Bay*, contra. The remaining part of the lot is of little or no value, as the object of the purchase is defeated, by the part taken off. No valuable improvements can be made on the remaining part, as *Hinds'* line cuts through in a diagonal direction, so as to leave only 23 feet front, and 135 in the rear. The jury will then easily perceive, that

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 Liber  
 v.  
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 Parsons.

the bargain ought to be rescinded *in toto*, and the full value of the lot given in damages. The *true rule* of estimating those damages is, not what the purchaser *pays*, or the consideration in the deed, but the value of the property at *the time of the eviction*, with interest from that date; for then it is, that the injury is sustained. 1 *Domat*. 77.

PENDLETON, J. There can be no doubt but that the measure of estimating damages, in a case like the present, is the value of the land at the time of the eviction. Men do not make purchases, with a view of merely having interest for their money; but they contemplate the rise in the value of the thing purchased. That value, then, the plaintiffs are justly entitled to. It is true, the whole lot is not recovered from them: a part still remains; but the remaining part is greatly depreciated by the shape of it. It is, therefore, a matter altogether for the consideration of the jury, in the estimate of damages they mean to give, whether they will apportion the damages according to the amount of the injury sustained, or give the full amount of the value of the lot, so as to rescind the contract entirely, as they think proper.

Verdict for plaintiffs to the full value of the lot—238l. 13s. 6d.



### TURNBULL *against* Ross.

Captures  
 made on land  
 by unauthor-  
 ised individu-  
 als, from an  
 enemy, does  
 not divest the  
 original owner  
 of the right of  
 property, unless  
 there has been  
 some kind of  
 condemnation  
 or distribution  
 made by some  
 competent  
 authority. *Vide*  
*case of Jenkins*  
*v. Putnam ante*,  
 p. 8.

THIS was an action of trover, brought to recover a negro wench, *Nancy*. This cause was tried before Justice PENDLETON, at *Camden*.

not divest the original owner of the right of property, unless there has been some kind of condemnation or distribution made by some competent authority. *Vide case of Jenkins v. Putnam ante*, p. 8.

During the war, it seems, some of Dr. *Turnbull's* negroes ran off, or were taken by a plundering party, from a settlement of his, called *Smyrnea*, in *East-Florida*, and carried into *Georgia*. The wench in question (with one or two others) was afterwards brought into this state, and she came fairly and honestly into the possession of the defendant, by purchase. The plaintiff, in the mean time, removed from *East-Florida* into this state, and became an *American* citizen.

On the part of the defendant it was urged, that the plaintiff being, at the time these negroes were taken from him, a *British* subject, residing in the dominions of his *Britannic* majesty, it was lawful for the citizens of *America*, to go into the enemy's country, and make captures. And if lawful to make captures, to bring them into the limits of the *United States*, and to dispose of them for the use of the captors. That a subsequent sale of such property, to *bona fide* purchasers, for a valuable consideration, was such a divestment of the original owner's right, as to bar the present action.

To this the plaintiff's counsel answered, that the elopement, or plundering of the negroes, by unauthorised individuals, though in time of war, did not deprive the original owner of his property; and relied in support of this position on *Puff.* b. 2. c. 6. s. 14. p. 180. That if the *United States*, or any individual state, had given commissions, (as in cases of privateers, &c.) and there had been a sentence of condemnation, there might have been weight in the objection. But nothing of the kind was alleged, not even a shadow of an authority given. The taking was by renegado individuals, who went not to annoy an enemy, or to bring resources into the country to enable it to carry on the war, but to enrich themselves. A species of private warfare and rapine, discouraged by all enlightened nations. In further confirmation of this doctrine, several cases were relied on. In *Doug.* 595. Lord *Mansfield* lays it down, that no property vests in any goods taken *at sea or land, by a ship or her crew, till condemnation as a lawful prize.* So

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v.  
Ross.

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Turnbull

v.

Ross.

in 2 *Burr.* 694. the property is never changed, *so as to bar the original owner*, in favour of a *vendee*, till there has been a sentence of condemnation. Therefore, the court of admiralty decreed restitution of a ship retaken by a privateer, after she had been fourteen weeks in possession of an enemy, because she had not been condemned.

In the case, likewise, of — v. *Sands*, a ship was taken in 1691, off *Yarmouth*, carried into *North-Bergen*, and then sold to *A*. *A*. sold to *B*. *B*. sold again, and she was sent to the *East-Indies*; then to *France*; from *France* to *England*, five years after her capture. She was then claimed by the original owner, and recovered; because there had been *no condemnation*. *Lu. Cas. in 10 Mod.* 79. The case of *Sir George Rodney*, (*Doug.* 592.) at *St. Eustatia*, where the principal part of the captures was made on land, was next relied on. He was an admiral entrusted with the command of a fleet, when he took that island; and general *Vaughan*, who was with him, commanded the land forces: and although they took upon them to fleece the unfortunate *Jews* of all the money and valuable effects they had, as well as others who traded to that island, and gave orders for the sale of the whole of their property; yet all *Europe* was exasperated at this conduct. It was considered as a most wanton abuse of power, a violation of the laws of nations, and nothing less than downright robbery and plunder. The court of admiralty in *England* was impressed with the same idea, for it gave no sanction to so unwarrantable a proceeding; and restitution was decreed as far as it was possible to identify the property of the sufferers.

Another ground taken on behalf of the plaintiff, was, that admitting, for the sake of further argument, the property was lawfully taken, and that it became a forfeiture by being brought within the limits of the *United States*; that in such a case, it was not a forfeiture to the individuals capturing, but to the state of which they are citizens.\* That, there-

\* See the case determined *July*, 1786, in *England*, since the trial of this cause, of governor *Johnstone* and general *Meadows*, who made the captures

fore, in the present instance, as the state had admitted the plaintiff to the right of citizenship, and he had found his property unappropriated by the state, he became entitled to it; as much so, as any other citizen in the state, was to any property he possessed. That the act for the admission to citizenship or naturalization, had a retrospective energy, and made him a citizen to all intents and purposes, as effectually as if he had been *born* one; (a) and consequently, if it had such a retrospective energy, it secured every right to him. Even children born *before*, shall inherit as if born *after* such act.

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Turnbull  
v.  
Ross.

(a) Co. Litt.  
129.

PENDLETON, J. charged the jury in favour of the plaintiff; and mentioned, that neither the laws of this state, the *United States*, or the laws of nations, authorised individuals to seize and plunder private property, though at the time within the territory of the enemy. That even in cases of captures made at sea, by ships or other vessels legally commissioned, a condemnation by a court of admiralty, of competent jurisdiction, was essentially necessary, before the original owner could be legally divested of his property. The plaintiff moreover, by becoming an *American* citizen, and so soon after the revolution, had every privilege secured to him, as much so, as if he had been *born* in the country. And certainly was entitled to his property wherever he found it.

The jury found for the plaintiff to the amount of the value of the wench and children.

on land, near the *Cape of Good Hope*; where it was determined that they belonged to the crown, which had a right to distribute them as it thought proper.

October  
Term, 1785.

MOUNIER against MEYREY.

Where a note is given for an old debt, recoverable by instalments, and afterwards negotiated as a cash note, the party taking it in payment, may return it, and have recourse over against the person negotiating it, on his original cash contract.

UPON a motion to 'set aside a verdict, and to grant a new trial. It appeared that the plaintiff *Mounier*, had sold goods to the defendant, to the amount of about 28*l.* sterling; for which the defendant gave in payment to him, *Francis Guerin's* note to that amount, as and for a cash note, not subject to the instalment law. After the note became due, an application was made to *Guerin* for the money, who produced affidavits and vouchers, to shew that this was not a cash transaction between him and the defendant, but given for an old debt, due from his father's estate; and of course, only recoverable by instalments, at one, two and three years. As soon as the plaintiff became acquainted with this, he tendered back the note to the defendant, and demanded payment for the amount of the goods sold him, which *Meyrey* refused to receive, alleging, that the note did not purport on the face of it, to have been given for an old debt, and that he ought to pursue his remedy against the drawer; whereupon the plaintiff brought his action for goods sold and delivered, and had a verdict.

*Smith*, for the motion, relied on the ground that this note, from the face of it, appeared to be a new note, and not one that was given for an old debt, before or during the war, and which came under the instalment law. It was in its nature negotiable, and being in the hands of an innocent indorsee for a valuable consideration, it could not be impeached on account of any prior transactions, which might have been between drawer and drawee. Though had it remained in the hands of the drawee, the consideration might have been gone into. It would, he said, be a great injury to trade and commerce, to call in question negotiable notes, in the hands of a fair indorsee; for which reason, the plaintiff ought to have gone on, and recovered against *Guerin*.

*Bay*, in reply, conceded that negotiable notes given in the way of trade, or in common transactions between man and man, since the year 1784, ought not to be impeached in the hands of innocent indorsees. But the note in question, was not one of that class, as appeared by *Meyrey's* receipts and vouchers, ready to be produced. From those, it was evident, that this note was given for an old debt due from *Guerin's* father's estate, before the war, upon a final settlement of account between the parties. And being such, it was no otherwise recoverable, than the old debt, for which it was given, would have been. The distresses occasioned by the ravages of the war, and the total inability of the citizens to pay their debts, immediately after the peace, had induced the legislature to pass the instalment law, making these old debts recoverable, in one, two, and three years. The fourth clause of that act, passed in 1784, expressly declares, "That all bonds and *other securities*, given since " *February*, 1782, (which included the time when this note " was given,) for debts contracted previous to that day, except " bonds and notes given for interest, shall be no otherwise re- " coverable, than the debts would have been for which such " securities were given." This of course altered the law, as it related to bonds and notes, given for old debts before 1782. It is very immaterial who is the *holder*, whether the *payee* or *indorsee*; for by the clause cited, the bond or note itself, is no otherwise recoverable, than *as an old debt*. This, then, being the case, and the defendant's contract being a *cash* contract, the court ought surely not to suffer such injustice to be done to the plaintiff, as to put him off with a note payable by instalments, for a cash payment.

*Per Curiam.* We are clearly of opinion, that the act of 1784, has altered the law with respect to those kind of securities, given for old debts, previous to the year 1782, and made them only recoverable, as the old debts would have been. This law does not restrain their negotiability, but merely prevents their recovery, otherwise than by instal-

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Mounier  
v.  
Meyrey.

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v.  
Meyrey.

ments. There is no doubt but that the plaintiff has been deceived, by the passing of the note to him by the defendant as a cash note. We do not say intentionally. But under these circumstances, it would be unjust to refuse him the benefit of his verdict. It would be permitting the defendant to take advantage of his own wrong. Therefore,

Let the rule be discharged. All the judges present, at the adjourned court.

N. B. Before the establishment of a court of appeals by the new constitution of *South-Carolina*, the judges were authorised, under an old act of assembly for the amendment of the law, after the jury trials were finished, to adjourn the courts not less than ten, nor more than twenty days, for the purpose of hearing and determining motions for new trials, and in arrest of judgment, &c. wherefore these sittings of the judges, for the purpose of hearing and determining law points, were called the *adjourned courts*.



*Cheraw  
Court,  
April, 1786.*

Lessee of AILSTON against SAUNDERS.

Length of possession of lands, may be given in evidence as presumptive of the existence of a grant or deed, which may have been lost, or destroyed by time or accident, though a younger grant for the same land, under the great seal, be produced.

This presumption is proper for the consideration of the jury.

EJECTMENT to try title to 640 acres of land. The plaintiff relied on a grant for the premises in question, under the great seal of the state, in 1775. The defendant claimed under a clause in the will of his grandfather, one *Murphy*, who devised the lands to him. He had no grant to produce, either from *North-Carolina* or this state, (the premises lying between the old and lately established boundary between those states.) But he contended, it was highly presumable that there had been a grant from one or other of them. Even if he had never had one; yet, from the length of time his grandfather and father possessed and occupied it, and who died in the possession, it would give him a good title. He then stated, that he could prove an uninterrupted possession in his grandfather and father, for upwards of 47 years; during which time, they had



successively cultivated and improved it, and himself after them, down to the present day. He also stated, that he had the will of his grandfather to prove the devise of the land to him.

The counsel for the plaintiff objected to this testimony, on the ground that no grant was produced, to shew that the crown, (when this state was a colony,) or from the state, since it became independent, had ever parted with the right. A bare naked possession alone, it was said, could never be admitted in a court of justice, to prove a legal title; for it was an established maxim, that *nullum tempus occurrit regi*: no length of time could run against the right of the king, when he had dominion over this country. And when this state had separated itself from that dominion, the right of the crown devolved upon the state, in its corporate capacity. That being the case, it must, therefore, be considered as vacant land at the time the plaintiff obtained a grant for it. As to the will, if the crown had never parted with its right, it could not give a title to the defendant.

PENDLETON, J. refused to permit the defendant to go into any proof of possession against a grant, under the great seal of the state; as none, he said, was admissible against the above maxim of the common law; or to suffer the defendant to give the will in evidence; so that there was a

Verdict for plaintiff.

*Waties*, for plaintiff.

*Bay*, for defendant.

Afterwards in *Charleston*. Present, at the Adjourned Court,  
*June*, 1786,

PENDLETON, BURKE, HEYWARD and GRIMKE, Justices.

A NEW trial was moved for by the defendant's counsel, on the ground, that the judge who tried the cause, had refused to admit such testimony as ought to have been permit-

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Lessee of  
Allston  
v.  
Saunders.

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ted to have gone to the jury on the trial ; to wit, the *presumptive* evidence of a grant, by *length of possession*, and the will of *Murphy*, the defendant's grandfather. And in support of the motion, it was argued, that by the act of assembly, passed in 1712, a quiet and uninterrupted possession for five years, except in cases of disability therein mentioned, then seven years possession, gives a title to lands against all the world. There is no exception in that act with respect to the claimant, whether the king, lords proprietors, (this state being then under their government,) or individuals. The terms of the act are so broad and comprehensive, as to leave no room for doubt on the subject. That the "*nullum tempus*" principle, was never contended for, but by kings only ; and, like most of the royal prerogatives, was a mere usurpation, in order to acquire and retain power to aggrandise the monarch. That republics were founded on other principles. They had for their object, the accommodation, the good, and the happiness of the individuals who composed them. The security of natural rights is a primary consideration with them ; and occupancy is the first and most natural right of mankind. Every infringement on it, is an encroachment upon a natural right, which no refined system of princely policy could justify. If, however, the principle could be considered as of force in this country, when it was originally annexed to the crown of *Great Britain* ; yet, when the king *parted* with his right to the lords proprietors, this *right* went with it. And the act of 1712, for quieting the possession of the inhabitants of the then province, passed while it was under their jurisdiction. This act, it is evident, *unqualifiedly* disclaims this right to all actual settlers. And when the lords proprietors aliened or conveyed back the right of soil and jurisdiction to the crown, there is no mention of this right, which had been thus disclaimed by them. This act of 1712, was a kind of charter, between the lords proprietors and the citizens of *South-Carolina*, which has never yet been revoked or annulled. But supposing this right to have been originally inhe-

rent in the crown, and that it had never been surrendered by the lords proprietors ; yet the revolution altered the nature of public rights, and all the feudal and royal principles which governed them, from which it was contended that this "*nullum tempus*" principle originated, ought not to be considered as a part of the common law of this state, adopted by our constitution ; but, like the ecclesiastical jurisdiction, and feudal rights, had become obsolete, and totally inapplicable to the circumstances and local situation of this country.

It was next contended, that if the whole of the doctrine urged against the "*nullum tempus*" principle, should fail ; still the evidence of possession ought to have gone to the jury, as presumptive evidence of the existence of a grant ; which might have been lost, mislaid, or destroyed. That this was a point proper for the consideration of a jury, and came peculiarly within their province. A grant or charter from the crown or state, which ought to be by record, may, under some circumstances be presumed. Possession for a great number of years, was by the court held to be a sufficient *ground of presumption of such a charter* to be left to the jury. *Cowp.* 102. 110. A presumption from mere length of time, which is to *support a right*, is very different from a presumption to *destroy it*. *Cowp.* 216. Though the record be not produced, nor any proof of its loss, yet under circumstances it may be left to a jury or court of equity, to *presume* there was such a charter ; because the proof of such circumstances, as could not have happened without the existence of such a deed or charter, is strong presumptive evidence, that there was such a deed or charter, once in being. *Cowp.* 110.

It is further laid down as clear law, in 2 *Durn. & East*, 151. 158, 159. that *grants, letters patent, and records*, may all be *presumed from length of time*. And that such *deeds, or grants, &c.* may be *pleaded as lost by time or accident*, without a *profert*. From these authorities, therefore, it was contended, that this kind of proof, ought to have been permitted to have gone to the jury, as presumptive evi-

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dence of the existence of a grant from *North-Carolina*, or this state, to *Murphy*; but which had been lost, or destroyed, by time or accident: and particularly the *will of Murphy*, who, it is presumed, never would have devised it to his grandson, unless he had had some grant or conveyance for the land in question.

The plaintiff's counsel, in reply, took nearly the same grounds as at the trial. But,

*The Court*, after hearing arguments on both sides fully, was of opinion that evidence ought to have been permitted to have been given to the jury, to prove the length of possession by the plaintiff's grandfather and father, as presumptive of the existence of a grant from one or other of the states, which might have been lost by time, or accident; also the will of the plaintiff's grandfather as corroborative of this presumption.

A new trial was therefore ordered.

On a second trial there was a verdict for the defendant.

*N. B.* The judges declined giving any opinion on the "*nullum tempus*" principle, as the other ground justified them in granting the new trial. But it has since been determined in the constitutional court of appeals, that *no time, or length of possession shall run against the state.* See vol. 2.

## FARR against M'DOWELL.

July Term,  
1786.

A MOTION was made to postpone the trial in this cause. The action was *trover* for negroes, and was regularly at issue the term before the last ; but then put off, at the instance of the defendant, on account of the absence of the witnesses. At the last term, it was again put off, for the same reason, but under a *peremptory rule for trial*, at this court.

*Pinckney* again moved the court for further time: and suggested that some unforeseen accidents had prevented the defendant's witnesses from attending from *North-Carolina*, where the process of this court could not run ; and observed, that it would be a ruinous business for the defendant, if he was now pressed on to trial ; as well as to his *special bail*, *Mitchell*, if he should be compelled to pay the money. It was true, he said, that the cause had been delayed for two courts, and was now under a peremptory rule for trial at a third court ; but it ought not to preclude the defendant from the indulgence of another court, if the circumstances of the case would warrant it. He trusted they would : and produced the affidavit of *Mitchell*, stating, that the defendant and all his witnesses, lived in *North-Carolina*, at a considerable distance ; that he had written to them all, to be here at this court, and he really expected them ; but high freshes in the rivers, and heavy rains, or other unforeseen accidents, might have prevented them from attending, and that no affected delay was really intended. That a peremptory rule ought to be so construed, as to mean, *provided some extraordinary accident or occurrence did not prevent it*. That it was never intended that such a rule should be construed to be *peremptory*, without *limitation or exception*. *Loft. 262. 786.* was quoted to shew that *peremptory* shall not have effect, *where*, without the fault of a party, a witness cannot attend. That the postponing a cause, or bringing it on, depends upon the rules of prac-

A peremptory rule for trial, is never to be so strictly construed, as not to admit of a *further* delay, in case of unavoidable accident or casualty. But where no extraordinary occurrence has happened, or due diligence has not been used, there the rule is to be adhered to.

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tice, made by the court, for the regularity of proceedings, and advancement of justice ; and that those rules may be dispensed with, or relaxed by the court, upon sufficient reasons. 4 *Burr.* 1989—96. 1 *Black. Rep.* 514. General rules, say Lord *Mansfield*, imply an exception, in cases where the *general* rule is used for *oppression*, or where the hardship of the case is such, that it would be *manifestly* unjust to include it within the general rule. 4 *Burr.* 1989. The court ought never to lay down a general rule so strictly, as that it may put unreasonable difficulties upon suitors, and render them liable to inconveniences, *worse than those* which the rule was intended to *prevent*. 4 *Burr.* 1996. He also quoted *general Gansel's case* as in point.

*Rutledge*, for the plaintiff, opposed the motion, and said, that it was incumbent on the special bail, to have sent *expressly* for the defendant and his witnesses, and not to have depended upon contingencies. There was no parity between this and *general Gansel's case*. There they had seas to cross, and winds and storms to encounter : here, only about 200 miles to ride. If *Mitchell* should die in the mean time, the plaintiff would be deprived of the benefit of special bail. The defendant may not be here again to give special bail. Were excuses of this nature to be received, and admitted by the court as sufficient, no plaintiff could calculate, with any degree of certainty, when his cause would come on ; and although it might be improper to press on a cause, unreasonably, where the defendant could not be ready, or where he was prevented by unavoidable accidents, from attending ; yet, in the present case, none such were stated in the affidavit, to justify a further postponement of the trial.

*Pinckney* then proposed, that *Mitchell* should bind his heirs and representatives, in case of his death, to pay the debt, if a verdict should go against the defendant, so as to make the plaintiff safe at *all* events ; as a further inducement for the court to postpone the trial.

*The Court* were unanimously of opinion, that on this offer, the defendant was at least entitled to have till another court, to prepare himself for trial. Indeed they were inclined to think so before the offer was made. But in this principle they were satisfied, that notwithstanding a rule is *peremptory*, yet it is with this restriction, that if any unforeseen accident or casualty intervenes, which puts it out of the power of the party or his witnesses to attend; in such case, the court will never construe the rule *so strictly*, as to work a manifest injustice to either party. But where no extraordinary occurrence has happened, and there appears to have been an unnecessary delay, or a want of due diligence, there the rule ought to be strictly adhered to. Therefore, let the peremptory rule be enlarged until next term, on payment of the costs of this court, and expenses of plaintiff's witnesses.

Present, BURKE, HEYWARD and GRIMKE, Justices.

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Mounier  
v.  
Meyrey.

LYNCH against M'HUGO.

July Term,  
1786.

ASSUMPSIT for board and lodging, &c. The original entry in the plaintiff's books was called for; when it appeared that no entry of the charge or account was made at the time the defendant lodged in the house of the plaintiff; excepting a *post* entry, some considerable time afterwards, not written in the leaves of the book where other charges were usually made, but on a leaf before the first page of the book. It appeared also, that the parties had been friends, and had lived amicably together for some time. There had, however, been a difference between them, and it was suggested, that these post entries were made after this difference had taken place; and from an inspection of the book, it had every appearance of it.

Entries made in the front leaf of a tradesman's books before the first page, and not in the regular course of charges, have a suspicious appearance, and therefore not proper to go to a jury. But the plaintiff may rely on other testimony, if he thinks proper.

The *counsel* for the defendant objected to this evidence going to the jury, because the entries are evidently out of the usual course of business, and not made in the regular

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v.  
M'Hugo.

order in which the transactions occurred ; and urged, that it would be a very dangerous thing to allow such kind of entries, made, perhaps, years after the occurrences had happened, to be good, in a court of justice, to charge a man, or his estate after his death.

*In reply*, it was said, that it was immaterial in what part of a book the original entries were made, whether in the first or last page of the book. The act of assembly, allowing merchants' and shop-keepers' books to be good evidence, was silent on the subject ; and if such entries were *fairly* made, it was all that the act required. As to the time when these entries ought to be made, it was also silent. It would be a hard case, indeed, if a man should be deprived of a just debt or demand, because it was not entered exactly on the hour or day that it accrued.

*Per Curiam.* The admission of merchants', shop-keepers', and tradesmen's books, and the oath of the parties themselves, to prove the entries, are *deviations* from the strict principles of the common law, and only allowed in favour of mercantile and regular transactions, under an express act of the legislature. It is, therefore, the duty of the court, to see, that nothing but what is fair and regular should go to the jury ; and wherever there is any departure from the usual and established rules of business, to require other proof than such entries. In the present case, these entries are out of the usual course, and by no means regular. They have, at least, a suspicious appearance, and ought not to be permitted to go to a jury.\* The plaintiff, however, may rely on other evidence in support of his account, if he pleases.

Nonsuit suffered.

Present, HEYWARD and GRIMKE, Justices.

\* In the case of *Cook and Thompson*, tried before *Pendleton, J.* a new book of entries was rejected, because it had the appearance of being fabricated for the purpose.



PLEDGER *against* WADE.

THIS cause was tried at *Cheraws*, in *November*, 1786, before BURKE, J. The action was *assumpsit*, upon a special agreement, as follows, viz. "Three months after date, I  
 " promise to deliver to *John Pledger*, or his heirs, his note  
 " of hand, due to *Ely Kershaw & Co.* for 818*l.* 19*s.* 9*d.*  
 " and interest due on ditto, 287*l.* 11*s.* 8*d.* amounting, in the  
 " whole, to 1106*l.* 11*s.* 5*d.* for value received of him this  
 " 11th of *February*, 1780.

(Signed)

" HOLDEN WADE."

On a special agreement in nature of a covenant to deliver a note of hand, jury may assess what damages they think reasonable, though less than the amount of the note agreed to be delivered up.

It appeared that the note to *Ely Kershaw*, from the plaintiff *Pledger*, was in *Charleston* at the time this agreement was entered into; but before the expiration of the time limited for its delivery, *Charleston* was invested by the *British* forces, and fell into their possession about the time the contract was to have been performed; so that it was almost impossible for the defendant to have procured the note mentioned. The question, therefore, was, as to the measure of damages.

*Bay*, for plaintiff, insisted, that this agreement was in the nature of a covenant, in which the damages are liquidated and settled by the parties themselves; and it was a well established rule of law, that wherever the damages were fixed and certain, the jury can neither give more nor less than the sum fixed; but where they were not ascertained, there they had a discretionary power. Here the sum of 1106*l.* 11*s.* 5*d.* being the amount of the principal and interest of the note to *Kershaw*, was fixed and ascertained with certainty by the parties. This amount, therefore, and no other, is the quantum the jury ought to give. These damages, too, ought not to be depreciated on account of the contract being dated in 1780, when money was at the lowest state of depreciation; because the agreement is for the delivery of a note given in the year 1777, and not subject to

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the depreciation act. The real value of the note and accruing interest, ought, in conscience, to be the measure of damages.

*Waties*, contra, contended, that the writing only acknowledged the sum of 1106*l.* 11*s.* 5*d.* to be the contract, and the value received on the 7th of *February*, 1780. It ought to be considered as so much money had and received to the plaintiff's use on that day; it could raise no further obligation, than to procure the note, if possible, (for the law never requires a man to perform impossibilities) or on failure, to *repay the money then received*. The depreciation act makes all contracts liable to be reduced by the scale of depreciation, at the time they were entered into. In 1780, money was at its lowest ebb, and consequently this sum of 1106*l.* 11*s.* 5*d.* ought to be reduced accordingly.

BURKE, J. left it to the jury to find a general verdict, or a special one, and leave the construction of the law to the court, as they thought proper.

The jury, however, returned a kind of compound verdict for 38*l.* 18*s.* 8*d.* the amount of money as depreciated in *February*, 1780, but allowed interest on the nominal sum contended for, making together 110*l.* 1*s.* 5*d.*

In *January* term, 1787, before PENDLETON, BURKE, and HEYWARD, Justices, the plaintiff's counsel moved for a new trial, on the ground that the jury had found a contradictory verdict, partly for the plaintiff, and partly for the defendant, which could not be reconciled upon any principle of law: for if the plaintiff was entitled to interest on 1106*l.* 11*s.* 5*d.*, he was surely entitled to the principal upon which that interest was calculated. If only to 38*l.* 18*s.* 8*d.* then this last sum, with interest on it, ought to have been their verdict,

*Waties* said, that the jury had in their discretion, as it was an action sounding in damages, exercised a kind of chancery power, and had given their verdict in that manner, so as to divide the loss, which the defendant was willing to submit to. Besides, if ever the plaintiff was called upon by

*Kershaw*, or his representatives, he would only have to make good the difference of the principal sum, as by this verdict he got back the value of the money he paid, 38/ 18s. 8d. in part of the principal sum, and all the interest.

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*Per Curiam.* As this is a case sounding in damages, and as the jury have thought proper to give a kind of equitable verdict between the parties ; and as this also appears to be a hard case, we are against granting a new trial.

Motion discharged.

Lessee of GORDON against The Executors of PARSONS. *Cheraw No-  
vember Court,  
1786.*

THIS was an action of ejectment, brought to recover 350 acres of land on *Pedee* river. The land was originally granted to one *Greenwood*, who conveyed to one *Rogers*, who conveyed to *Gordon*, the father of the plaintiff's lessor ; under whom the lessee of the plaintiff now claims.

The deed to *Gordon* is dated in 1766, when he took possession of the land. He kept possession until 1776 or 1777, when he was forcibly turned off by a person claiming under the defendant's testator, *Parsons*. It appeared, from the deeds produced at the trial, that *Rogers*, several years after he had conveyed to *Gordon*, made another conveyance of the same land to *Parsons*, in *Charleston*, which was duly recorded in the secretary's office. It also appeared, that *Gordon*, who was an illiterate man, never recorded his deed of conveyance, but locked it up in his desk, and kept it securely by him till he died ; when his son, to whom the land came by descent, found it amongst his papers, at the time of taking an inventory of his effects.

Where there are two conveyances of the same land, and the last deed is first recorded in the register's office, the party claiming under the first deed, not recorded, may relinquish it, and rest upon his statutory right of possession, which is good.

A person forcibly turning another out of possession of lands, shall never gain a title thereby, so as to defeat the claim of possession of the party dispossessed.

The defendant relied on the act of assembly, passed in 1698, to prevent deceits by double mortgages and conveyances of land, &c. which declares, " that the sale, con-

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“veyance, or mortgage of lands and tenements, (except  
“original grants,) which shall be first registered in the regis-  
“ter’s office in *Charleston*, shall be taken, deemed, adjudg-  
“ed and allowed of, and held to be the first sale, convey-  
“ance and mortgage, and to be good, firm, substantial, and  
“lawful, in all courts of judicature within *South-Carolina*,  
“any former or other conveyance, sale, or mortgage for  
“the same land, notwithstanding.” This clause of the act  
was conclusive in favour of the plaintiff’s testator, and  
gave him an indisputable title against all the world, as his  
conveyance was first upon record.

On the other hand, it was urged for the plaintiff, that  
although old *Gordon* (who was certainly ignorant of the ope-  
ration of the act quoted) had incautiously kept this deed of  
conveyance, without having had it first recorded; yet he  
could relinquish his claim to the land under the deed from  
*Rogers*, and rely upon his *statutory right of possession*;  
which gave him a right *paramount* to that of *Parsons*, al-  
though his deed was *first* recorded; and offered to pro-  
duce evidence of an uninterrupted possession in old *Gordon*,  
for more than 10 years after the date of the conveyance  
from *Rogers*, until he was forcibly turned off by *Parsons’s*  
agent. But to this evidence

The *defendant’s counsel* objected, because the lessor of  
the plaintiff was out of possession. And they insisted,  
that this kind of evidence could only be given in favour of  
persons in *actual* possession of the premises in question.

*In reply* to this objection, it was said, that whatever  
weight it might have on ordinary occasions, where a pos-  
session was *voluntarily* relinquished by a party, who had  
*gained* a right by it; still, in a case like this, the defendant  
ought not to be suffered to *take advantage* of it; because,  
here was a *forcible* dispossession and intrusion, unwarrant-  
ed and unsupported by law, against old *Gordon’s* will and  
consent. It would, therefore, be extremely improper, to  
suffer a man to cut and carve out his own mode or remedy  
of gaining possession of land as he pleased, and then to per-  
mit him to take advantage of his own wrong, by *justifying*

it. That if *Parsons*, in his life-time, had the title in him, he ought to have commenced his action ; in which case, he would have found old *Gordon* in possession, or some person claiming under him ; and then, there could be no doubt, but that he might have given evidence of his *statutory* right by possession. That, therefore, under these circumstances, his heirs at law ought to be considered as in the place of his father, who should be considered as in possession, and to enjoy every right under, and by virtue of it.

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*The Court* overruled the objection ; because, if sustained, it would have a tendency to permit a man to take advantage of his own wrong, (which the law abhors,) and suffered the plaintiff to go into evidence of his possession.

Several witnesses were then called, who proved an uninterrupted possession in old *Gordon*, of ten years after the purchase from *Rogers*.

After this testimony was given, the counsel for the plaintiff relied also on *the limitation act of 1712*, second clause, which declares, "that all claims to lands shall be prosecuted within five years after such claim accrues ; otherwise, the party claiming, and all persons under him, shall be for ever barred from receiving the same." The third clause of the same act, further declares, "that all claims shall be by suit at law, and that no other claim whatever, should be allowed in any court of record." Here, then, it was contended, that *Parsons* had not prosecuted his claim within five years after it accrued ; and further, that when he thought proper to *make* a claim, it was not a *legal* one, such as the law required, but a *tortious* one, which, instead of giving him a right, made him a *trespasser*.

*The Court* were clearly of opinion, that notwithstanding the deed to old *Gordon* had not been first recorded, according to the directions of the act, so as to give him a title thereby ; yet the plaintiff might relinquish his claim under it, and go

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into his *statutory title of possession*; which being clearly proved, they thought entitled the plaintiff to a recovery.

Verdict for plaintiff.

*Bay*, for plaintiff.

*Waties and Parker*, for defendants.

A motion for a new trial was afterwards made at the adjourned court in *Charleston*, but the rule was discharged.



October Term,  
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THOMAS and SETH FOSTER *against* SINKLER.

The original book of entries of a merchant or shop-keeper, is good evidence to go to a jury, upon the plaintiff's swearing to the same; and where one of the co-partners, who made the entries, is out of the state, the other co-partner may swear to his hand writing in the books.

These entries are *prima facie* evidence of a delivery.

THIS was an action of *assumpsit*, for goods sold and delivered, to the amount of 23*l.* sterling. The entries in the original waste-book were in the hand-writing of *Seth Foster*, one of the co-partners at the time they were made, who kept the books, and who had, before the commencement of this suit, removed to *Virginia*, where he had settled and then resided. The plaintiffs took an interlocutory order for judgment by default, and upon executing the writ of equity, *Thomas Foster* was produced as a witness to prove the books, when

*Parker*, for the defendant, took an exception to the admissibility of this testimony, on several grounds: first, Because the book itself was no evidence, being barred by the statute of 7 *Jas.* I. c. 12. which was of force in this state. Secondly, That the evidence of *Thomas Foster*, was not the *highest* kind of evidence which the case admitted of. And thirdly, That the entry itself was defective, as no mention was made in it of the person to whom the goods were delivered.

*Bay*, for the plaintiff, said, that these exceptions were new and unusual. It had been the uniform practice of the courts of justice in this country, for many years past, to

admit such testimony, and he had never heard it called in question before. As the objections, however, had been taken, it was necessary they should be fully and satisfactorily answered; more particularly as the mercantile and planting interests were deeply interested in the determination of the question; and upon this

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*The Court* ordered the case to lay over till the next term for argument, without prejudice to either party.

The case, afterwards, to wit, on the 9th of *February*, 1787, came on to be argued at the adjourned court, before PENDLETON, BURKE, and HEYWARD, Justices, when

*Parker* renewed his objections, and insisted, that the statute of *James* expressly prohibited the offering, or giving in evidence, any merchant or tradesman's books, unless it be within one year after the goods sold, or work done. The account here is of several years standing; and, even within the year, it did not alter the common law, with regard to the nature of the proof necessary to be offered in support of the entries, which requires that the proof must be made by some clerk or indifferent person, and not by the suppletory oath of the plaintiff himself, so as to be a witness in his own cause. With respect to the usage or custom which had prevailed in this country, of suffering books of accounts to be offered in evidence, after the expiration of one year, upon the party himself coming in and swearing to the entries; it was an erroneous one, contrary to the *letter* and *spirit* of the statute of *James*, which had never been repealed by any express act of assembly, in *South-Carolina*. Granting that the custom existed, it might vary in some cases the common law, but it surely could not operate as a repeal to a *positive* law.

2. He next argued, that even if this kind of evidence is admissible, for a party to come in and prove his own books, yet *Thomas Foster*, who was offered to be sworn, was not the highest evidence the case would admit of, *he* knowing

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nothing of the contract. The copartner who made the entries ought to be produced. He had voluntarily left the country, and settled in another state, and had thereby deprived the copartnership of the benefit of his testimony, for it could not be supplied by any other means, as long as he was alive. He admitted there were cases in the books, where proof of the hand-writing of a clerk, who made the entries in a tradesman's book, was allowed as good evidence; because the act of God had deprived the party of his testimony, and the next best evidence from the necessity of the case was resorted to. But in no case, where the witness was alive, and might be procured, can such kind of testimony be regularly given.


3. With regard to his last ground, he said, it was very obvious that there was a great defect in the entries themselves, in not specifying *to whom* each parcel of goods was delivered, as the *custom of the old merchants* (he said) *in Carolina* had been; and the more especially too, as the *practice and indulgence of our court*, had been to admit the book itself as chief evidence, on the *suppletory* oath of a party himself. This custom of the old merchants arose out of the local circumstances of this country, which were very different at that time (1721) from what they were in *England*. There, a clerk could always be resorted to as a witness, to prove the delivery, or, in case of his death, proof of his hand-writing was *prima facie* evidence of it; here, shop-keepers and tradesmen did not keep clerks. Most of them kept their own books, and therefore it was more incumbent on them to mention the names of the persons to whom the goods were delivered, in order to guard against impositions and frauds. For otherwise, it would be much in the power of a dishonest tradesman or shop-keeper to impose on a customer, by making entries of goods, or work or labour, which had never been delivered or performed. And by the *practice and indulgence* of our courts, he meant to distinguish it from the law of the land. It was not, he contended, a *part of the common law of the land*, nor is it the *statute law*, nor the *law of merchants*. It is only a rule of prac-



tice of the courts, which may be adhered to, or relaxed, at pleasure. The reason given in *Trott's collection* of the laws of this state, does not exist at the present day, for the merchants are *overstocked* with clerks, and, *cessante ratione cessat ipsa lex*.

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*Bay, contra.* Although the statute of 7 *James* I. chap. 12. is to be found in the list of *English* statutes, extended to (the then province of) *South-Carolina*, in the year 1712, yet it is very doubtful whether it ever went into operation ; or if it did, it must have gone very soon afterwards into disuse, or have become obsolete. For the county and precinct court act, was passed only *nine* years after the act *extending the British statutes* in 1721, and the tenth clause of this latter act expressly recognises, " That it had been before " *allowed for law* in the then province, that *books of account* " *shall be allowed for evidence, the plaintiff swearing to the* " *same* ; by reason that the merchants and shop-keepers in " *South-Carolina*, had not an opportunity of getting appren- " *tices and servants, to deliver out their goods and keep* " *their books, as the merchants and shop-keepers in Great* " *Britain had.*" This clause is declaratory of what the law was, previous to the passing of the *county and precinct court act*, in 1721 ; and nine years is a very short period to establish a custom so firmly, as to become an acknowledged part of the law of the land. From whence it is highly presumable, that notwithstanding the statute of *James* was extended to *South-Carolina*, yet it was found inapplicable to the *then* situation of the country, for the reasons mentioned in that clause, and consequently never went into operation. If it had been considered as of force in 1721, the legislature would most certainly have repealed it *expressly*, instead of passing a clause *declaratory* of the law, in opposition to it. If, however, it should be considered, that this statute was of force down to 1721, yet the foregoing clause in the county and precinct court act *virtually* repealed it, by declaring *that* to be the law, which contradicted it. And this law has been the acknowledged law of the land

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down to the present day, which is upwards of 60 years. How long it was in use before is uncertain. It seems to have been a principle borrowed from the *civil law*, (which admitted books of account, with the *suppletory* oath of the merchant, at all times to be good evidence, 3 *Blac.* 369.) and very early adopted in this country as part of the law of the land. The courts of justice have been uniformly governed by this principle; and even if it were an error originally, it has been so long in use, that the maxim *communis error facit jus*, will well apply. And it is much safer to adhere to this custom, as part of the law of the land, than to set afloat and unravel all the decisions heretofore made on the subject.

2. In reply to the arguments offered in support of the second objection, he observed and argued, that the act of any one copartner of a house, on behalf of the copartnership, is the act of the company; and this is good in all cases, as well *for* as *against* them. They are in law regarded and known as *one* person. Whatever the whole might do, either for or against a copartnership in the way of trade, any one may *lawfully* do. Merchants, for the benefit and extension of trade, are highly favoured in all countries, for which reason a peculiar code has been adopted for their convenience, called the *law of merchants*, which gives them these privileges. There is no kind of question, but that if *Seth Foster* were here, *his* evidence would be the *highest* that the case would admit of; but as he is out of the country, and not within the jurisdiction of our courts, the *next* best evidence must be resorted to, which is the evidence of his copartner, *Thomas Foster*, to prove the entries in the books. It is a rule of law, that if a witness be dead, or gone beyond the sea, proof of his hand-writing is good evidence. *Esp.* 300. *Doug.* 89. A person out of the state, is as much out of the jurisdiction of the court, as if he were beyond sea. So that the same rule will hold good.

3. As to the last objection taken, on account of the omission in the entry book, of the person's name to *whom* the goods were delivered, the law does not require it. To do,

therefore, what the law does not make requisite, is superfluous. The law goes on this principle ; that the purchaser took away the goods at the time of the purchase. In *England*, the custom is for a merchant or shop-keeper to send home goods to a customer, under the care of a trusty servant or *warehouse* man : here, the customer takes or sends for them himself, and the entry is never made till the goods are *actually* delivered ; so that the entry is *prima facie* evidence of the delivery. In the case of *Pitman and Maddox*, *Salk.* 690. *assumpsit* was brought for a taylor's bill. At the trial, Lord *Holt* allowed the book as good evidence ; it being proved, that the servant, who would have been a competent witness, and who wrote the entries, was dead, and that they were in his hand-writing, and *no proof was required of the delivery of the goods*. The present case bears a strong resemblance to this of *Pitman and Maddox* : *Seth Foster* would have been a competent witness ; but as he is out of the state, proof of the entries being in his hand-writing is therefore sufficient, without any proof or mention of the delivery. The entry itself is *prima facie* evidence of it.

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PENDLETON, J. was clearly of opinion, that the *original* book of entries of a merchant or shop-keeper, is good evidence to go to a jury, upon the plaintiff's *swearing* to the same ; and where one of the copartners, who made the entries, is out of the state, the other copartner may swear to his hand-writing in the books. He thought also, that these entries were, in this country, *prima facie* evidence of a delivery.

BURKE, J. concurred.

HEYWARD, J. doubted on the second objection ; but said he would decline an opinion, as his brethren had already decided in favour of the plaintiff.

Objections overruled.

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*Thomas Foster* was then sworn to prove the books, and there was accordingly a verdict for plaintiffs.

July 9, 1787. M'MULLEN against The CITY COUNCIL of Charleston.

Where the court of wardens of the city of Charleston undertake to convict a man of an offence under an act of the state, and to commit him for a penalty under such act, the proceedings are null and void; being confined by the city charter to the recovery of fines and penalties only, under the city ordinances made in pursuance of the charter.

THE plaintiff was convicted by the court of wardens for selling spirituous liquors without license, contrary to the act of assembly; fined 50%. and committed to gaol for non-payment. He was afterwards brought up before the court upon a *habeas corpus*, and a motion was made for his discharge, upon the ground that the court of wardens had not jurisdiction of this offence, and consequently no power to convict and imprison him.

The *counsel* for the plaintiff, in this motion, mentioned, that this was a new case, and it became, of course, necessary to consider, first, The nature of corporations and their limited jurisdictions, with some of the incidents attached to them. 2. To take a view of the corporation of the city of Charleston, and the powers of the court of wardens. And, 3. To observe upon the conviction, fine and imprisonment, and see how far they correspond with the powers assumed by them, and those of the common law.

1. With respect to a corporation, it was argued, that it was an *artificial* body of men, or body politic, which had no natural rights, but such as were given it by the supreme power which gave it existence. 1 *Bac.* 499. That corporations were originally intended for cities and large towns, for the encouragement of their manufactures, trade and commerce, and for the regulation of their police and internal government; but were never calculated to superintend the general interests of the community, or to go farther than the domestic regulations of the city or town incorporated. *Russ. Mod. Europe. Rob. Hist. Charles V.* That it was (to make use of the language of the law) the creature of


the charter, which exists only in supposition or intendment of law. That this charter prescribes its utmost limits and bounds, beyond which it cannot pass. That all the privileges and powers it enjoys, are not *rights*, but *bounties* given by the supreme authority which gives the *being* or *thing* existence. *Co. Lit.* 130. 3 *Mod.* 13. 10 *Co.* 306. In *England*, there are a great variety of corporations, all differing from their local circumstances, numbers, opulence, and places where they are created. Some are vested with large, others with very limited powers. But in general, there are some incidents common to them all, such as *suing* and being *sued*; having a common seal; having courts of limited and confined jurisdiction of certain matters mentioned in their charters. Some of these courts are courts of record, some not. Where no authority is given to *fine and imprison*, in that case, such inferior court is *not a court of record*: on the contrary, where there is a power to *fine and imprison*, it *makes* it a court of record. *Co. Lit.* 117. 1 *Bac.* 559. One uniform rule, however, runs through the whole of them, viz. That *nothing shall ever be intended* to belong to any of them, or to be within their jurisdiction, but what is *expressly given*. *Id.* 562. Whenever, therefore, they proceed to take cognizance of things not cognizable by them, or not expressly given them by charter, such proceedings are *coram non judice*, and void, and all persons acting under, or in obedience to their assumed authority, are trespassers. They cannot justify under such supposed jurisdiction. *Salk.* 201, 202. *Holt* 186. 2 *Mod.* 30. 196. That illegal judgments of a superior court were only *voidable* by a writ of error; but, of an inferior court, *absolutely void*. *Salk.* 674.

2. That the 4th clause of the act incorporating the city of *Charleston*, passed in 1783, ascertains its powers; and, among other things, authorises the city council to make by-laws, and to affix and levy fines for the breach of them. The act of 1784, enlarging their powers, gives them authority to *commit to close prison for the breach of their ordinances*,

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which makes the court of wardens a court of record, and it enlarges their jurisdiction, in civil matters, to 20%.

3. As to the conviction, this was for the offence of selling spirituous liquors; an offence neither cognizable by them, either by their charter, or the act of 1784, any more than *homicide* or *manslaughter*. It is not an offence against *any* of their by-laws; therefore, their power to commit did not extend to this offence. It is an offence against the public revenue act of the state. This act is *not* one of the by-laws of the city corporation, but a *public* law, cognizable only by the supreme court throughout the state. The second clause of the revenue bill, passed in 1784, it is true, gives the license money, arising from licenses for taverns and billiard tables, within the limits of the city, to the corporation. It inflicts the fine of 50% for selling spirituous liquors, or keeping billiard tables; and it enacts that this fine shall be *recovered in any court of record within the state*. Here then is the power *grasped at* by the court of wardens—*any* court of record in the state. And say the wardens, our court being one of record, we have the power to levy this fine or forfeiture. But this would be a very wrong construction; for, by “*any court of record in the state*,” must be meant the supreme court. This is a *forced* construction; it can never apply to inferior jurisdictions, *for nothing shall be intended to be within their jurisdiction, but what is expressly given*. 1 *Bac.* 562. The law is clear upon this point, that wherever a statute prohibits a thing, and appoints that it shall be determined in any court of record, it can only be proceeded against in one of the supreme courts in *Westminster*, or court of *oyer and terminer*; because, these being the highest courts of record, shall be intended to be meant and spoken of, *secundum excellentiam*, and not inferior ones. 2 *Hawk.* 21. *Salk.* 178. 2 *Hawk.* 268. *Gregorie's* case, in 6 *Co. Rep.* 19, 20. is also in point. All these cases shew, that this being an offence against a public revenue act, the fines can only be recovered in the supreme courts at *Charleston*, or in the circuit courts in the country districts. Besides, the sum here is 50% and the power of

the court of wardens, to sue and recover, is confined to 20%. but as this was not an offence against any of their by-laws, even were it under 20% they had nothing to do with it. Lord *Holt* says, these trials in a summary way deprive the subject of the inestimable trial by jury, and therefore ought to be *strictly* watched. They are against *Magna Charta*. *Holt's Rep.* 215. These summary jurisdictions, says Lord *Mansfield*, ought to be kept within strict bounds. 4 *Burr.* 2208. 2281.

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*The Court*, after hearing the recorder in reply, and considering the whole of the arguments, were of opinion, that the proceedings in the court of wardens were irregular and void. Whereupon the plaintiff was discharged.

Present, BURKE, HEYWARD, and GRIMKE, Justices.

—●—  
 BOURKE *against* BULOW.

UPON a motion for a new trial. It appeared that the plaintiff had recovered a verdict in this case, against the defendant, for 230% sterling, for a breach of contract entered into in the year 1780, for delivery of flour and tobacco. The writing was dated 17th of *August*, 1780, and was in the nature of a note or memorandum, signed by the defendant, for 47,410% old currency, to be paid in the following manner, viz. 23,705% to be paid in flour, at 500% currency, per cwt. and 23,705% in tobacco, at 200% per cwt. This note or memorandum was given or signed, in order to settle the balance of a bond which the defendant had given to the plaintiff, in *February*, 1780, for the balance of accounts which had subsisted between the parties, prior to

The court will never grant a new trial on account of the smallness of damages, in order to give a plaintiff another chance of getting more. The jury are the proper judges of the quantum, in all cases sounding in damages, except in covenant, where the sum is fixed by the parties themselves.

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that time. The bond was cancelled on the defendant's signing the note.

The jury, in estimating the damages, gave the value of the 47,410*l.* old currency, at the time the contract was entered into, agreeable to the scale of depreciation, and interest thereon. This verdict, it was alleged, was not equal to the value of the flour and tobacco, had it been delivered; and, therefore, the present motion for new trial was made, because the jury, it was said, had given less damages than the plaintiff was entitled to.


*Rutledge and Pringle*, in support of the motion, argued, that this was an action in nature of a breach of covenant, on a written agreement. That the contract was a *specific* one; that is, for the delivery of a certain quantity of produce at a given time. That the defendant had failed in the delivery, and ought to pay the value of those articles, agreeable to the contract, or market price at the time they were to have been delivered. Many cases, they said, had been determined upon this principle, that where a specific thing was agreed to be delivered at a fixed time, and no price mentioned, and there was a failure; that in every such case, the value of the thing at the time mentioned for delivery, was the measure of damages for the jury. That in this case, however, the price was ascertained and settled, by the parties themselves, to wit, 500*l.* for every hundred weight of flour, and 200*l.* for the same quantity of tobacco; so that the jury could not give more or less than the price stipulated for in the agreement. Calculating the flour and tobacco, then, at these rates, they would have been worth, on the day of delivery, the sum of 494*l.* sterling, which, with interest from that day down to the finding of the jury, would have amounted to 736*l.* sterling. That this was evidently the sum to which the plaintiff was legally entitled, and the jury ought not to have given less. This sum might appear large, and much beyond the value of the 47,410*l.* at the date of the contract; but it should be remembered, that the contract on the part of the defendant, was a *voluntary* one, and being so, he was bound by it. Even in



equity, the inequality of a contract freely enter into, is no ground to set it aside. That in all cases where the sum is uncertain, jury may fix damages; but where the precise sum is fixed and agreed upon by the parties, that very sum, and no other, is the ascertained damages, and the jury are confined to it. 4 *Burr.* 2228, 9. They compared it to a contract for transferring stock at a day certain, where defendant was bound, though stock had considerably risen. 5 *Bac.* 248.

*Calhoun* and *Bay*, contra. This is a motion for a new trial, on account of the smallness of damages given by the jury. There are many cases in the books, for new trials on account of excessive damages, where they have been granted; but few or none, on account of the smallness of damages. It is said, that this is in nature of an action of covenant, for a specific performance, where the sum is fixed and ascertained, and the jury cannot give less. This, however, is not the case. The action is assumpsit for the recovery of 47,410*l.* old currency, on a note given 17th of *August*, 1780, for that sum, and which appears to have been the balance of a bond entered into by the defendant in *February*, 1780; and which was on that day taken up and cancelled. If, indeed, it had been an absolute and independent covenant, unconnected with any prior transaction, and not given for the purpose of settling an old debt, the doctrine contended for, and the cases cited, might well apply; but considering the case as it really is, they are totally inapplicable. What did the defendant owe the plaintiff on the 17th of *August*, 1780? Why, 47,410*l.* the balance due on the bond. What was this new note taken for? To secure payment of it. If then, *Bourke* is paid the sum, with interest, will he not be fully paid off and satisfied? Surely he will: he cannot in justice or conscience demand more, and this the jury have given him. It is admitted, that this was the sum due on the 17th of *August*, 1780; yet, say they, here was a new bargain. This sum was not only to be paid, but it was to be paid in a certain way—not in money, but in *flour* and *tobacco*; which, if they had been

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delivered, the plaintiff would not only have been paid, but he would have had 494/. besides, as a clear profit. This is what the law calls a catching bargain ; which neither a court of law, or equity, will countenance. 1 *Vern.* 467. 2 *Vern.* 402. 1 *Atk.* 351, 2. The jury, therefore, have exercised a very proper discretion, in giving a verdict for what was really due, with interest upon it. And to have given more, would have been an act of injustice. It is clear law, that in an action of assumpsit, sounding in damages, (supposing this to be one of that kind,) the jury have a right to give what they think just, in proportion to the loss the party sustains, by violation of the contract. 2 *Bac.* 4. In the present case, there is no real loss ; for the jury have given the value of the 47,410/. agreeable to the depreciation scale, which was worth 160/. 11s. sterling, and interest to the day of the verdict, making together 230/. sterling. And if no loss was sustained, then surely the plaintiff was not entitled to any other damages, after being made whole. Again, it is laid down, that in all actions sounding in damages, the jury have a discretionary power to give what they think proper. And though in contracts, the *very specified* sum agreed on is *usually* given, yet, if there appears any circumstances of hardship, fraud, deceit, or the like, jury may proportion and mitigate the damages accordingly. 2 *Bac.* 4. Many late authorities confirm this doctrine. *Say. Law of Dam.* 44, 45, 46 and 47. 2 *Str.* 1140. 2 *Barn.* 129, *Law of Dam.* 197, 8, 9. 205, The case of *Pledger v. Wade*, (*ante*) was also relied on, as in point. Upon the whole, they concluded, that full justice had been done to the plaintiff in the action, and that the court would not, they hoped, set afloat this verdict, to give the plaintiff another chance of getting higher damages. That to set an example of this kind, would be inviting, in fact, every man who did not get as high damages as he wished, to apply for another trial.

*By the Court*—Present, BURKE, HEYWARD, and GRIMKE, Justices. The jury, in this case, seem to have exercised a

very proper discretion, by considering this rather in nature of an assumpsit for a debt due, than in nature of a covenant for a specific performance. They have given the plaintiff what the defendant appears really to have fallen in his debt ; though, taking it upon the contract for delivery of flour and tobacco, they might have given larger damages. We do not think it proper to set aside a verdict, because the damages are small, in order that a plaintiff may have another chance of getting more. It is a maxim in law not to do it ; nor will we depart from it, unless very peculiar circumstances indeed appear to justify it. None such we now perceive ; therefore we overrule the motion.

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PORTER *against* DUNN.

TROVER for five negroes, viz. *Peter*, his wife and three children. The plaintiff, *Robert Porter*, was an officer in general *Sumter's* brigade, in 1780 and 1781 ; and the defendant, a planter on *Black river*, who had joined the *British* while they were at *Camden*, and performed duty as a soldier in their militia.

The negroes in question were formerly the property of the defendant, but had been captured while the defendant was with the *British*, and delivered over to the plaintiff in lieu of pay, for his services as an officer in the line, and taken into *North-Carolina*, where he resided. They were afterwards enticed away by the defendant, and this action was brought to recover their value.

It will be recollected, in the history of this country at the period alluded to, that the *British* forces had overrun almost every part of it, and there was no money in circulation to enlist men, or bring them into the field, the continental and state currencies having about that time died a natural death. In the pressure of those circumstances,

Where negroes were taken from an enemy, or their adherents, during the war, and delivered over to the officers and men in general *Sumter's* brigade, in lieu of pay ; the original owner, by virtue of an act passed in 1784, was divested of his right of property, and the state only became responsible for the value.

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general *Sumter*, who had been a very active officer in the course of the war, conceived the idea of raising a brigade, and paying the officers and men with the property of those who had joined the enemy, and taken up arms in their cause. This plan he submitted to the consideration of the commander in chief, and other officers of distinction, who gave it their sanction and approbation. In consequence of which, he issued a proclamation, calling upon the citizens of *America* to join him, and promised, as their rewards, the property taken from the enemies of the country *within the British lines*, or from those who had joined their standard. This proclamation drew numbers to him, particularly from *North-Carolina*; and in a short time, he was enabled to procure, and bring forward into the field, a great body of men, who contributed much by their exertions, in driving the enemy from the upper country.

It appeared in evidence on the trial, that in order to do justice to the officers and soldiers in the brigade, a commissary was appointed to take charge of the property so taken; and a board of field officers was also appointed, whose duty it was to examine into the claims of each individual, and likewise into the property taken; and if the property belonged to any citizen of *America*, or one who was friendly to the interests of the country, it was restored to them; but if to the enemy, or *their adherents*, it was to be delivered over, at a fixed valuation, to the officers and men, in lieu of pay. It also appeared in evidence, that in the course of the distribution of the negroes among the troops, that the wench, *Peter's* wife, and one child, were delivered to *Porter*, the plaintiff; that he purchased *Peter* from a brother soldier; and that the wench had two children while they were in his possession.

*Pinckney*, for defendant, argued, that he had never been divested of his property, either voluntarily, or by any competent tribunal. The taking away negroes from the defendant's plantation, and giving them to the officers and troops in general *Sumter's* brigade, was an unlawful act, not warranted by the law of nations, or any municipal law.

That in a civil war, such as the revolutionary war was, the right of property depended upon the final issue of the contest, and the stipulations then entered into by the contending parties ; or until altered by some act of the supreme authority of the state, or competent tribunal. It was true, that the defendant had been deluded and prevailed upon at one period to join the *English* standard ; but it should be remembered, that in the year 1780, and in the early part of 1781, the *British* had, by a superior force, overrun the greatest part of the southern part of the country, from the sea-coast to the mountains ; and many good citizens, well attached to the cause of *America*, had been either seduced into their service, or forced to throw themselves under their protection, until the enemy were driven back to the garrisons on the sea-coast ; and who, after that turn of good fortune, went back to their farms and plantations, and ever afterwards behaved well. That the defendant was one of this last description of men, and had conducted himself, since his return to his allegiance, as a good citizen. That the treaty of 1783 deprived him of none of his rights as a citizen of *America*, but on the contrary, exonerated him from all criminal prosecutions, for any thing done during the war, That if he was, by this formal and public act of his country, forgiven or excused for the part he had taken ; it followed of course, that all his civil rights, originally attached to him, were also restored. He further contended, that even the property taken from an open and avowed enemy, was not changed in war, until the capture had been legally investigated in some court of competent jurisdiction, and until a *condemnation* had there taken place. He cited to this point the case of *Jenkins v. Putnam*, (p. 8.) also the case of *Turnbull v. Ross*, (p. 20.)

*Pringle*, in reply. The act of taking away the property from the original owner was not squared by the nice rules of law ; yet, the urgency of the times, and the desperate situation to which the country was at that time reduced, well justified its policy. The state was overrun, ravaged and pillaged, from one end to the other, and its defenceless

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inhabitants suffered every species of injury and insult. It was without resources, and without men to defend it. Upon this trying occasion, new and extraordinary measures were necessary, and they were adopted. What were the consequences? Why, of the most beneficial nature to the state. If, therefore, there was a deviation from the known and established rules of warfare, in cases of civil dissensions, the country was bound and pledged to support its enterprising citizens in the transaction, and save them harmless from every species of civil or criminal prosecution. And they did it. He then quoted the act of assembly, passed in 1784, "to indemnify brigadier-general *Sumter*, and the "officers acting under his direction, during the *British* invasion," which enacts "that no indictment, or suit at "common law, or in equity, shall be brought or maintained "against the said *Thomas Sumter*, or any state or militia "officer acting by his orders, authority or command, for "any trespass *vi et armis*, or trover, or for any debt, or "damage incurred, *if the same was committed or incurred "on public account, and appropriated for the use, and with "intent to give success to the operations of war, conducted "by the said Thomas Sumter, during his command in the "militia of this state, and the state troops under his command ; but all such actions or suits commenced, or to be "commenced, shall, upon pleading the general issue, and "giving this ordinance in evidence, be dismissed with "costs. That in all cases where any property hath been "taken from any person resident in this state, and "appropriated to the public use, by order of the said brigadier-general *Sumter*, such person or persons shall apply for redress to the legislature, and not elsewhere."*

From the tenor of this act, he contended, that whatever ~~was immovable~~, or not conformable to the rules of war, in the he general, or any of his officers, was cured . They were completely indemnified by it, and so disposed of for public use, vested in the whom it was delivered. The only remedy the etor had, was by an application to the legisla-

ture, who had in many instances, where favourable circumstances accompanied the applicant's claim, granted full compensation.

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GRIMKE, J. presided at the trial of this cause, and charged the jury, that the practice of taking property from an enemy, or its adherents, and dividing it among the soldiers, was not justified by the laws of nations or rules of warfare. That it had a tendency to promote licentiousness in an army, and on that account, was much discountenanced by all civilized nations. But the act of assembly of 1784, for indemnifying general *Sumter*, places this case beyond all doubt: it exonerates him, and all persons acting under his authority, from any prosecution or suit, on account of property taken, in order to give success to the operations of war. And expressly directs, that the former owners shall apply to the legislature, and not elsewhere: which seems to legalize all the proceedings of those officers; and, in fact, vests the property in them.\*

The jury returned a verdict for the plaintiff, to the amount of the value of the negroes.

A new trial was afterwards moved for in *Charleston*, before a full bench, on the ground that the plaintiff had not performed the services which would have entitled him to the delivery of the negroes in question; and on the further ground of the *defendant's case being a hard one*.

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A new trial was therefore ordered, on payment of costs.

This cause came on to be tried a second time at *Camden*, when Justice BURKE was present, and there was a second

\* *Note.* The constitution of the *United States*, and the constitution of *South-Carolina*, passed in *June*, 1790, both guard against *ex post facto laws* in future; consequently all such will, it is presumed, be for ever hereafter considered as null and void by the judges of this state, and those of every other state in the Union.

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verdict for the plaintiff. The defendant acquiesced in it, and afterwards applied to the legislature for redress.



### The Executors of MIDDLETON against ROBINSON.

An action of *trespass* or *tort*, will survive to a testator's executors; and although it does not survive against them, yet by *waiving* the tort, and going for the value of the thing, *assumpsit* for money had and received, will survive as well against, as for, executors.

THIS was a special action on the case, for the value of cattle, taken away from the plantation of the plaintiffs' testator, during the late war, and driven to the *British* garrison at *Camden*. In the declaration, was a *count* for money *had and received*.

The defendant *demurred* to the action, and for cause of demurrer stated, that the suit was brought for a cause of action, which could not by law *survive* to the plaintiff, being in the nature of a *trespass* or *tort*. On *joinder* in demurrer, the question came on to be argued, whether this action could be maintained or not.

*Pringle*, in support of the demurrer, contended generally, that this was a kind of injury, which, from its nature, was a trespass. It is a species of tort, which arises *ex delicto*; one committed by force and against the peace, &c. Therefore, the maxim *actio personalis moritur cum persona*, perfectly applies to it. That at common law, an executor could not bring trespass for a damage done to testator; as for instance, the carrying away his goods and chattels in his life-time. 2 *Bac.* 439. And therefore it was an injury which died with the party who received it.

*Bay*, contra, laid it down as a general position, which he said was well understood and admitted, that an executor stood in the place of his testator, and represented him in all his *personal contracts*, and therefore might regularly maintain any action in his right, which he himself might do, were he alive. He was aware, he said, that this might be confined to *contracts*, in contradistinction to *torts* and *tres-*



*passes.* But the statute of 4th *Edw.* III. ch. 7.\* (made of force in this state) expressly enacts, "That executors shall have an action against trespassers and wrong-doers, in taking away the property of testator in his life-time, to recover damages in like manner, as they, whose executors they be, should have had, if they were alive." This statute alters the ancient common law, and under a proper construction of it, not only *trespass* and *trover*, but every other action for recovery of personal property will lie; for whenever any injury is done to the personal estate of the deceased, in which he is represented by his executors or administrators, in that case they may maintain *an action on the case*, &c. within the equity of the statute. *De bonis asportatis in vita testatoris*, 4th *Edw.* III. which gives an action of trespass for a wrong done to a testator in his life-time. *Cro. Eliz.* 377. 1 *Vent.* 30. 4 *Mod.* 404. 1 *Lord Raym.* 40, 41. 1 *Salk.* 314. The maxim, "*actio personae alis moritur cum persona*," extends to wrongs and injuries of a different nature from injuries done to property; such as, *assaults*, *batteries*, *slander*, *false imprisonment*, *escape* against the sheriff, or the like, &c. There appears, however, a material distinction between actions *for* and *against* executors: for, in many cases, an executor within the equity of the statute of 4th *Edw.* III. may maintain an action for an injury *done to a testator*; whereas if it had been done *by a testator*, an action could not be supported against his executor, as coming within the rule of *actio personalis*,

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2 *Bac.* 445.  
*Cowp.* 575.

\* *Vide Trott's Collection* of the laws of this state, page 241. By an act of the legislature, passed in 1712, all such *British* statutes as were confirmatory of the common law, or which secures the life, liberty, and security of the persons and property of the subject, and which were applicable to the situation of the then existing circumstances of the province, from *Magna Charta* down to the reign of Queen *Anne*, were extended to *South-Carolina*, leaving out all such as were useless and unsuitable to the constitution and government of the same; all which acts, and clauses of acts, so extended, are particularly mentioned in a schedule or list annexed to the said act. And no others were ever admitted to be of force, except the act of *Geo.* II. making lands liable in the colonies as chattels for payment of debts, and one or two others of general utility, which, by construction, have been considered as of force here.

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2 Bac. 455.

Cro. c. 297.

1 Roll. 921.

6 Mod. 126.

Comp. 375.

Ibid. 375.

Ibid. 375.

&c. For instance, if a sheriff suffer one to escape on *mesne* process, the executor of the plaintiff may maintain suit against him ; because, the *body* of the prisoner, being a pledge for the debt, the executor might be otherwise without remedy, which is an injury to the *goods* of testator, and *not to his person*. But, in case of the death of the sheriff, the party could have no remedy against his executor, as it is a *personal* neglect or injury which *dies* with him. Wherever the cause of action is for money due, or contract to be performed, gain or acquisition of the testator, &c. the action *survives* ; but where it is a *tort*, or arises *ex delicto*, supposed to be by *force*, and *against the peace*, &c. there the action dies, as in *trespasses*, *assault*, *batteries*, &c. before mentioned. Other actions, however, may be substituted in their room, upon the very same cause, which *do* survive against executors. No action will lie against an executor, where the declaration must be *quare vi et armis et contra pacem*, or where the plea must be *not guilty*, as in *trover* ; for upon the face of the record, the cause appears to arise *ex delicto*, and all private injuries, as well as public wrongs, are buried with him. But in all these cases, where trespass, trover, or the like, would lie *against* a testator, another action will lie against his executor, by *waiving* the trespass or tort, and bringing the action of *assumpsit for money had and received*. For instance, an action against a common carrier, is for a tort or supposed crime. The plea is *not guilty* ; therefore, it would not lie against an executor. But *assumpsit* will lie notwithstanding, for the value of the goods lost. So, if a man take a horse from another, and bring him back again, trespass cannot lie against his executor, though it would against the testator, but an action for the use and hire will lie against the executor. Here, then, is the grand fundamental distinction, says Lord Mansfield. If it is a sort of injury, by which the offender acquires no gain to himself, at the expense of the sufferer, as beating, imprisonment, &c. there the person injured himself has only an action for a reparation in damages ; but where, beside the crime, *proper-*

*ty* is acquired, which *benefits* the testator, an action for the value of the property, shall survive against his executor. As if a man cut down trees, his executor shall not be liable for the *cutting down*, yet he is chargeable for the value of them. So far, therefore, as the *tort* goes, executors shall *not* be chargeable ; but wherever the tortious act *benefits* a testator or offender, his *assets* ought to answer. *Cowp.* 377. In the present case, the action is not for the trespass or offence of driving the cattle off, but for the value of them ; so that at common law, as the tort is waived, the action would lie as well for, as against executors. But the statute of *Edw.* III. expressly gives it to executors, though it is silent as to the action which survives against them ; and at common law this action would lie against executors for the value of the property.

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4 *Mod.* 404.  
*Ld. Raym.* 41.

*The Court.* The common law gives no remedy whatever *to or against* executors for torts, or trespasses, &c. But the statute of *Edw.* III. enables executors to bring those suits for injuries done to their testator. So that trespass would lie in this case. But even at common law, by *waiving* the tort, and going for the *value* of the property, the action of *assumpsit* survives as well *for as against* executors.

A *respondeas ouster* was ordered, and the case went afterwards to the jury to ascertain the value of the cattle.

*Cheraw District, Nov. Court, 1787.*

WILLIAMSON *against* BACOT.

A tender made of paper currency in 1781, after it had gone out of circulation, (though the act remained unrepealed making it a tender,) is not good, under the peculiar situation of the state at that period.

DEBT on bond for 1,000*l.* old currency. Plea of tender.

On the trial it was proved, that on the 1st of *January*, 1781, the full amount of the bond was tendered in paper money, and that the plaintiff refused to accept it. A special verdict was found by the jury, submitting to the court at *Charleston*, whether this was a good tender in law or not.

*Parker*, for defendant, relied on the *act* of 1778, which authorised the issuing of this paper currency, and made it a tender *in all cases whatsoever*. This act was not repealed till the *Jacksonborough* assembly, in *January*, 1782; consequently all tenders made between those two periods, whilst the act was in full operation and force, were good and effectual in law, and as such ought to be supported in our courts.

*Bay*, in reply. The act of 1778, it is true, has made this money a legal tender, but it was under an idea that the money had a real value: for, it cannot be supposed that a legislative body would have made any thing a tender in payment of just debts, unless it had a value attached to it. If, then, this was the idea of the legislature, how can it be conceived, that they had it in contemplation to make it a tender longer than it had some value. It is notorious, that after the surrender of *Charleston*, the money never had *any* circulation; of course, *no* value. It then became extinct; yet the tender pleaded, was made upwards of eight months subsequent to that event. Under these circumstances, therefore, it would be extremely iniquitous to give it a legal sanction, when it was absolutely *good for nothing*. As to the existence of the law of 1778, till the year 1782, there was no legislative body to repeal it, for the *British* forces, at the period the tender was made, had possession of the greatest part of the state. Had there been a legislature, there is no doubt but what that act would have been repealed. One of

the first acts which the *Jacksonborough* assembly passed, after the enemy were driven within their lines, was to repeal this law. And the sense of the country was clearly expressed by the *depreciation act*, passed at the same session, which carries down the scale of depreciation no farther than the *capitulation of Charleston*. Had it been their idea or view, that this kind of paper should be considered as having any value, they certainly would have carried down, or have continued the scale, after that period, to some other time, or probably down to the time of passing the depreciation law itself, in *January*, 1782. As they did not, it was a *virtual* repeal of the *tender* law, after that event had taken place.

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v.  
Bacot.

*By the Court.* This tender, made after this species of money had gone out of circulation, is certainly no bar to the plaintiff's recovery. Under the peculiar circumstances and situation of the state at that period, no court of justice could uphold a plea of this kind. The *depreciation act* fixes the lowest period of its legal existence down to the 10th of *May*, 1780, and no further. To give, therefore, any efficacy to a tender made after that time, would, in fact, be to revive and give it circulation, after it was *sunk* and *good for nothing*.

Let the plaintiff have his *postea*.



STEEL, *qui tam*, against ROACH.

June 2, 1783.

AN information upon the revenue laws of the state had been filed by *Moultrie*, attorney-general, at the relation of the plaintiff, against the defendant, *claimant* of the cargo of the schooner *May-Flower*, for landing in the port of *Charleston* 25 barrels and 5 hogsheads of sugar, 11 barrels

The court  
will not grant  
a new trial on  
a *qui tam* or  
penal action.

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of coffee, and 9 boxes of oil, before a *permit* was obtained, *entry* made, or *duty* paid ; and also for unloading in the morning, before sunrise, contrary to the acts of the legislature ; by reason whereof, the whole became forfeited, one half to the informer, the other half to the state. The defendant being unacquainted with the revenue laws of this country, and the person on whom he relied being equally so, and a foreigner, he landed 12 barrels before sunrise, (as the tide then suited to bring them on shore,) which, upon finding his mistake, he *tendered* to the prosecutor, and *contested* as to the residue. Upon trial, there was a verdict for the defendant.

A motion was afterwards made for a new trial. But

*The Court*, after full argument, discharged the rule, upon the ground of this being a *qui tam* or *penal* action, in which case the court will seldom grant a new trial, as these kind of penal actions are considered as hard and rigorous ones.



Camden, 1789.

STEEL against M'KNIGHT.

*A.* makes before a witness, a verbal gift of property to *B.* his grandson and a minor, in these words, "Bear witness to this gift ; I give, &c. to my grandson," &c. &c. The property remains in the possession of *A.* till his death ; after which it is appraised and

THIS was an action of *trover* for a negro woman slave, *Venus*, and her six children. The claim of the plaintiff was founded on a gift from his grandfather, made to him when he was a boy, upwards of eighteen years ago.

It appeared, from the evidence of one *Leslie*, at the trial, that he was employed by *Barnes*, the grandfather of *Steel*, as a ploughman, when the gift took place. He was called one day out of the field, where he was at labour, by *Barnes*, to be a witness to the gift. When he came to the house, *Barnes* told him, that he had given the wench *Venus* (who

— sold, with the rest of his estate, in consequence of no person appearing on behalf of the minor, to make a claim, or forbid the appraisement and sale. This gift is good and valid against a *bona fide* purchaser or holder of the property.

was then a girl) to his grandson *John Steel*: upon which he called the girl, *and put her hand into that of his grandson*, saying to *Leslie*, “*Bear witness to this gift: I give this girl to my grandson, John Steel.*” The plaintiff and the negro girl lived with *Barnes* till the day of his death; after which, this girl was appraised as part of *Barnes’s* property, and sold with others at public sale. *Barnes* died intestate, and no person appeared on the part of the boy, to forbid the appraisement and sale. It was admitted, that the wench afterwards came fairly into the possession of *M<sup>c</sup>Knight*, the defendant; so that

The only question was, whether, under the foregoing circumstances, the plaintiff was entitled to a recovery against a *bona fide* purchaser, after such a lapse of time?

GRIMKE, J. in his charge to the jury, held, that the gift was complete on the part of old *Barnes*, and from that moment, the property vested in the plaintiff. That *Steel* had never sold or made any transfer of her; and being an infant under the age of discretion, no *laches* or neglect could be imputable to him *durante minoritate*. He mentioned that several cases had been determined, where gifts from parents and relations had been deemed good and valid, which were attended with much less solemnity than in the present one, and where the property had remained in the possession of *donors* and *executors* many years after the gift. Our courts had always inclined much in support of these kind of gifts to children and married women.

*Verdict* for plaintiff, which was acquiesced in by defendant’s counsel.

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v.  
M<sup>c</sup>Knight.

June 12, 1789.

BAY against FREAZER.

An indorsement on the back of a bond, making its contents payable to order, and for value received, is a good bill of exchange, within the custom of merchants, so as to charge the indorser; though the bond is not in its nature negotiable.

THIS cause came on to be tried before WATIES and DRAYTON, Justices, and a *special* jury of merchants.

*Thomas Elliott*, deceased, of *Combahee*, in some transaction with the defendant *Freazer*, gave him a bond for 200*l.* sterling; *Freazer*, on a purchase of negroes, negotiated this bond over to *John Hall*, and upon the back of it made this indorsement, viz.

“ Pay the within contents to *John Hall* or order, value received, (Signed) JOHN FREAZER.

“ 12th *July*, 1785.”

*Hall* afterwards gave this bond in payment to *Bay*, the plaintiff in this action. *Elliott* soon after becoming insolvent, an application was made to the defendant for payment, who refused.

The declaration contained three counts. *First*, Upon an implied warranty on the part of *Freazer*, to pay this bond in case of the insolvency of obligor, with an averment, that *Hall* was the assignee of defendant, and that the plaintiff was the assignee of *Hall*, and that as such he had a right of action upon this implied undertaking.

2. That defendant drew a bill of exchange on the 12th *July*, 1785, in favour of *John Hall* or order for 200*l.* That *Hall* afterwards indorsed it to the plaintiff, who as indorsee had a right to recover according to the law and custom of merchants.

3. The third count was for money had and received.

*Pinckney* and *Pringle*, in support of the first count, argued, that there is an implied undertaking, by every obligee of a bond, who passes it away to a third person, for a valuable consideration, in case of failure on part of the obligor, to repay or make good the money to the assignee or any subsequent fair holder. That in this instance, the obligee may be considered as the seller of the bond, and the assignee as the purchaser; and in every sale for a valuable



consideration, there is an implied engagement from the seller to the purchaser, to secure and warrant the thing sold ; or, on failure of the consideration, or thing so sold, to repay back to the purchaser the value thereof. What was the thing sold in this transaction ? Not the paper and wax of the bond. They were intrinsically worth nothing, further than being *evidence* of a debt. *The money was the thing sold.* What was to be secured in this contract ? Not the mere possession of the paper and wax, but the *payment of the money mentioned in the bond.* Natural justice speaks for itself, and requires it, and no artificial reasonings can ever do away this obligation. But supposing this contract should be considered as an exchange, (and every contract where money is not paid down may be considered in that light,) still the same principles as in cases of sales will govern it. For it is laid down, that things given in exchange, are considered as things sold ; and, therefore, come under the same rule. What was the case here ? It may be said that *Hall* gave the defendant negroes, in exchange for *Elliott's* bond ; and that the defendant gave the same bond, in exchange for negroes. It is evident, then, that the parties were under mutual obligations. On the part of *Hall* he was bound to *warrant* the negroes. *Frazier* on his part was equally bound to warrant the payment of the money. Besides, it is a well established rule in law, that the receiving a sound price for any commodity, raises a warranty against all defects or faults, known or unknown to the seller ; for as men lay out their money, or give valuable effects to get something equally valuable in return, it is not reasonable, if the thing turns out good for nothing, that the seller should keep the money for the thing, which apparently had a value, when in fact it had none, so as to throw the loss upon the buyer. And as to an innocent purchaser, it is the same thing to him whether the seller knew it, or not, since in either case he receives an equal injury. It is true, that in the one case, the seller ought to pay damages for a fraud, whereas in the other he ought only to make the party whole. For these reasons, the law has

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Bay  
v.

Frazier.

1 *Domat.* 57.2 *Black.* 452.1 *Domat.* 55.  
57.2 *Wood,* 285.*Doug.* 20.

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v.

Freazer.

1 Bac. 536.

5 Co. 77.

Carth. 519.

wisely raised this warranty to prevent men from imposing hardships on each other.

That the *assignee* of an assignee, the executors and administrators of an assignee, are all comprised within the word "*assigns*:" therefore the plaintiff can well maintain this action as the assignee of *Hall*, who was the assignee of *Freazer*, the defendant, upon this implied warrantry under the first count in the declaration.

2. If any doubt, however, could arise upon the doctrine urged in support of the first count, yet under the second, the defendant is clearly liable. This bill is for *value received*, and it is payable *to order*: one part shews a full consideration, or value to have been paid for it. The other gives it currency, and makes it negotiable, within the *custom* of merchants.

3. Under the last count in the declaration for money had and received, it is settled, that wherever a man ought not *ex equo et bono* to retain money, as for money *paid by mistake*, or upon a consideration which fails, assumpsit will lie to recover back.

*Rutledge* and *Parker*, contra, contended that the plaintiff could not recover under the first count in this declaration, because in this case the law did not raise any such covenant of warranty as was insisted on. They admitted, that in case of sales of moveables and effects, a doctrine of the kind urged on behalf of the plaintiff might apply. All the authorities quoted in support of that warranty, related to the sales of *goods* and *effects* only. *Choses in action* or *debts* are governed by other rules; for upon a transfer or assignment of debts, the kind of obligation raised by law, is not that of the solvency of the debtor, but that of the *debt* being *really* and *bona fide due* from such *debtor*. A *right* only is warranted by the transfer, and not a *guaranty of payment* of the money, in case of the insolvency of the obligor. At any rate, an assignment cannot be construed to amount to more than a *collateral* under taking to pay in case the obligor does not. But in this case no proof of insolvency of *Elliott* has been given; and, therefore, upon their own principles,

1 Bemat. p.  
79.

the plaintiff's counsel cannot surely expect to recover.

Upon this

*Pringle* produced evidence of *nulla bona* having been returned on various executions lodged in the sheriff's office against *Elliott*, which the court admitted to go to the jury, as *prima facie* testimony of *Elliott's* insolvency.

The counsel for the defendant then urged, that this was a *chose in action*, and consequently, from its nature, not assignable over, so as to enable an assignee to sue and recover in his own name. That even if *Elliott* had been alive, the present plaintiff could not have sued him, otherwise than in the name of *Freazer* the obligee.

2. They next argued, that under the second count, the plaintiff was not entitled to a recovery, because the pretended bill of exchange, mentioned in this count, is void for *uncertainty* and *informality*. To give it the utmost efficacy, it amounts to no more than a common assignment of the right of the debt, on the back of a bond. It has not the requisite of a bill of exchange. It is not directed to any person; nor is any sum mentioned to be paid, or by whom. The drawer cannot be charged; he is not answerable, until a demand is first made on the drawee, and a *protest* for non-payment, or non-acceptance, duly made and entered. In this case, no protest can be made, because the notary cannot tell to whom to present the bill for payment. It is altogether out of the usual course of trade, not conformable to the *law* of merchants, and, therefore, not recoverable under it. Another reason: the bond, itself, on which this memorandum, (or bill, as it is called,) is indorsed, is not in itself negotiable. And no indorsment can give it negotiability. No legal construction can make it otherwise than a *common* assignment of a *right* to a debt.

3. As to the last count for money had and received, there is no privity of contract between the plaintiff and defendant. If money has been paid to *Freazer*, it was paid by *Hall*. If it has been unjustly detained by him, it was detained from *Hall*, and not from the plaintiff. *Freazer* and

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*Nulla bona* returned by the sheriff on an execution against a defendant, is *prima facie* evidence of insolvency to go to a jury.

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the plaintiff had no transactions together ; and if so, no injury can be done by detaining money, which the plaintiff could have no claim upon him to refund. Therefore, the equitable principle mentioned by the plaintiff's counsel cannot apply. 2 *Ld. Raym.* 1241, 2. And also, *Alexander & Owen's* case, in *Durnf. & East*, were relied on.

*Pinckney* and *Pringle*, in reply. Nothing has been advanced to do away the force of what has been already said in support of the first count. For, whatever can apply to the sales of *moveables* and *effects*, will go as forcibly to the sales of debts. Every man who transfers a bond, or other debt, must be under an impression, at the time he passes it, that such debt is either *good* or *bad*. If he deems it good, then he must present it as such ; and if it turns out otherwise, he is bound by his representations : and he shall not afterwards be permitted to come into a court of justice and take advantage of his own misapprehensions, by saying that he was mistaken when he represented it as good. If he knew the debt to be bad, and passed it off as a good one, then it is an *absolute fraud* ; so that, in either case, the rules of justice will equally hold against the person assigning.

2. The law of bills of exchange requires no express set of words to constitute a bill. It is sufficient that it *be in writing* ; that the sum to be paid be sufficiently certain ; that it be for *value received* ; and payable *to order*. *Cunn. on Bills*, 22. 3 *Bac.* 606. 1 *Salk.* 128. 2 *Ld. Raym.* 1397. The bill in question has all these essential requisites ; first, it is *in writing*, signed by the defendant. 2. The sum is *sufficiently* certain, because the bill is drawn on the back of the bond for 200*l.* The words are "*pay the contents.*" What are the contents ? The amount of the bond, 200*l.* The mind of man cannot possibly form any other idea of it. The rule then "*id certum est quod certum reddi potest,*" will apply. Whatever can be made certain, by a plain reference, carries with it as much precision and certainty, as if expressed in positive terms. The sum mentioned is 200*l.* The words "*within contents*" have a very plain and obvious reference to that sum ; *sufficiently* so, to establish the *certain-*

ty of it. 3. The bill is expressed for *value received*, which shews that a full consideration was given for this 200/. 4. It is made payable *to order*, a circumstance in itself sufficient to shew, that the party *intended* to give it *currency*, and make it *negotiable*. So far then it has all the requisites of a bill of exchange. With respect to the address or direction of the bill, it is equally as clear as the *sum to be paid*. Who was to pay, or in other words, who had got the effects originally into his hands? *Elliott*, the obligor. The direction therefore must have been to him to pay, and to none else, because *he* only was the *debtor* or person *bound* to pay. But it is said he was not called upon in the proper manner, either by an application for the money, or by suit at law. To this there is a plain answer. He was *notoriously* a bankrupt on record, not by common reputation or calculation only, but by the return of the sheriff, and the evidence of other officers of the court. It would therefore have been a waste of time and money to have pursued him further. It may be compared to drawing a bill upon one who has no funds of the drawer in his hands, or to a declared bankrupt after he has given up all his effects. The great objection, however, in this case, (and the one upon which the defendant principally rests,) appears to be, that this bill was drawn upon a *bond not negotiable*, and not being *originally* so, no indorsement can give it negotiability. Here is the rock upon which he has split in this case. It was never contended that the bond was *negotiable under this count*, or that the plaintiff could recover upon the bond, in a *negotiable* quality. It was only urged, that notwithstanding this bond might not have been *originally* negotiable in itself, still the defendant might *make* himself liable by a *negotiable order* upon it, as between *himself* and any *subsequent* indorsee. Such indorsee, it is true, cannot recover in his own name against the obligor of the bond; but it is insisted that he *legally* may against the *indorsee* upon this *new undertaking*, when he gave it currency or threw it into circulation. The words, "pay the contents to *J. H.* or order, for *value received*," certainly made a new undertaking,

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and changed the nature of the contract entirely. Instead of being a *debt* on the obligation against the *obligor*, or against the *assignor* by the *assignee*, upon an implied *warranty*, it became a *new* debt by the *custom of merchants*, so as to charge the defendant upon his *indorsement*. For every indorsement is in the nature of a *new bill*. It creates a *new* undertaking, *independent* of the original one. *Salk.* 125. 133. An assignment of a bill, payable to *J. S.* or bearer, is not a good assignment, to charge the drawer with an action on the bill, *but it is a good bill between the indorser and indorsee*; and an indorser is liable on an action for the money, for every indorsement is in nature of a new bill. *Salk.* 125. 133. *Show.* 125. 3 *Lev.* 299. So that, admitting to the fullest extent of the word, that the bond is not a negotiable paper, still the indorsement of *Freazer*, the defendant, on it, makes it a *bill of exchange*, within the *custom of merchants*, and makes him clearly liable on that *new* undertaking alone.

3. The count for money had and received is the most general and extensive which can be framed. It comprehends and embraces almost every possible case, where a person is under any kind of obligation, in justice or equity, to pay money, to whomsoever he may be, who is entitled to receive it. Wherever a right is transferred, all the incidents attached to it go with it; so that whatever obligation the defendant was under to *Hall*, the plaintiff *Bay* acquired by virtue of *Hall's transfer* to him, as he stood exactly in his (*Hall's*) place. This right forms the essence of every assignment or indorsement, of one individual to another. The plaintiff, then, being in the situation of *Hall*, natural justice requires, that if the defendant got a sound and good property *from Hall*, he should give the value, or a good consideration for it: but if this consideration should fail, the same principles of justice require, that he should restore back what he had got, or pay its value to the plaintiff, the indorsee of *Hall*. In *Moses and M'Farlane's* case, 2 *Burr.* 1009, 10. this doctrine is very fully laid down,

where Lord *Mansfield* says, the courts extend these kind of actions, so as to reach the justice of every case. In one word, he says, in all cases where the defendant is obliged, by the ties of natural justice, to refund or make good the money, this action for money had and received will lie.

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*The Court* were of opinion, that under the second count in the declaration, and the authorities and reasons urged in support of it, the plaintiff was entitled to a verdict. Every indorsement, they said, was a *new* undertaking, and gave negotiability when payable to *order*, and for value received, although the paper itself, on which the indorsement was made, was not *originally* negotiable. That this bill was sufficiently certain by reference, to bring it within the law of merchants. As to the first and last counts in the declaration, they expressly declared, that they did not mean to give any opinion on them, but would reserve themselves upon those points, until a case should occur where it would be necessary.

*The Jury* found a verdict agreeable to the opinion of the court, but did not allow interest.



MONGIN and Wife, late PENDARVIS, against BAKER and STEVENS. *Southern Cir. cul.*

UPON a motion and application for a writ of dower, at *Beaufort*, in the *April* session of 1789, the following special case was reserved to be argued at bar in *Charleston*.

Some time previous to the year 1782, *Richard Pendarvis* intermarried with Mrs. *Mongin*, the present plaintiff's right; therefore, the widow of a person placed on the confiscation list, is entitled to her dower.

The court will never give so harsh a construction to the confiscation act, as to deprive a person of a common law entitlement to her

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wife ; and they lived and cohabited together till *Pendarvis* died. By the *Jacksonborough(a)* assembly of 1782, the heirs and devisees of *Pendarvis* were placed on the *confiscation* list ; and since the *peace*, part of his estate was sold by the commissioners of confiscated estates, to *Stevens*, one of the defendants ; and the residue, by an act passed in 1784, was restored to *Baker*, the other defendant. The question, therefore, was, whether the plaintiff's wife was entitled to dower in her former husband's estate, or not ?

*Desaussure*, in support of the application, contended, that the common law right of Mrs. *Mongin* became complete by the death of *Pendarvis*, her former husband, without any judgment or treason against him. 2 *Black.* 129, 30. It could not be taken away from her, but by some act of her's, amounting to forfeiture ; or by some law, which, disregarding private rights, had disfranchised or divested her of this estate. In the present case, it was not pretended she had committed any act which forfeited her claim of dower. Innocent, therefore, herself, her right must remain unimpeached, unless some law deprived her of it. The only act or law in being, which can possibly affect the claim, is the *confiscation* act of 1782. By a clause in this act, the estate of the heirs and devisees of *Pendarvis* is confiscated. What was this estate ? A fee-simple—liable to all incumbrances and charges. One of the first and highest of these, in the eye of the law, is a widow's claim for dower. It is preferable in law to mortgages and judgments. The state could not acquire any greater or higher estate in the lands in question, than the heirs and devisees of the deceased would have had. And if it had gone over to them, would it not have been chargeable with the widow's dower ? Most certainly it would. With what apparent justice then, can the state be supposed to acquire a greater right than the heirs and devisees would have done. If such a doctrine were once admitted, it would in fact be saying, that a body politic or corporate has greater rights than an individual citizen. Her right, however, is not inconsistent with the confiscation act. This act enables the commissioners to sell



so much as is confiscated ; that is, so much as the state acquired, which only reaches the estate of the heirs and devisees. They held one estate ; she another. The act expressly reaches *their* estate, but does not in the smallest degree, attach itself upon *her's*. He quoted 2 *Black. Com.* to shew that different persons may hold different estates in the same land. Also, *Id.* 199. From whence he argued, that the omission of her estate in the lands in question, proved, that the legislature never intended to extend this heavy penalty to the widow.

He next contended that common law rights were sacred in their nature, and not to be set aside lightly, by intentment or implication. On the contrary, that acts of *attainder* were generally looked upon with a jealous eye. They were highly penal, and for that reason it was a well known rule, that all penal statutes were to be construed strictly. 1 *Black. Com.* 87, 88, 89.

It might be urged, he said, that the confiscation act amounted to a bill of attainder against *Pendarvis* ; that it was tantamount to a conviction and judgment for treason at common law, which amounted to a forfeiture of the widow's claim of dower. But this he denied. At common law, it is true, that a conviction and judgment of treason works a *forfeiture* of dower, (2 *Black. Com.* 136.) but none such was pretended in this case. *Pendarvis* was never called upon to answer in his life-time ; nor was any judgment of treason ever entered up against him. As to the terms of the act itself, there was nothing in it which would amount to an attainder, unless it was by a *forced* construction, no wise consistent with the humane principles of our constitution. Constructive treasons and attainders, are the most dangerous, the most pernicious doctrines ever introduced among mankind ; fit, perhaps, for a star chamber, but not for a country which boasts of civil liberty. The confiscation law, he granted, *did* punish certain classes of political offenders, for certain offences, (in many instances not capital by the then existing laws,) by confiscation of their property, and banishment of their persons ; which, not-

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withstanding it was highly penal, did not amount to an attainder, either *expressly*, or by *operation of law*. And to give it a contrary construction, would be stretching the penal system to an extent not authorised by the principles of our government, or the spirit of our criminal jurisprudence. Our courts of justice, surely, would not be fond of making *implied* attainders. The doctrine of attainders and forfeitures, he said, was losing ground daily. It was considered as a barbarous and odious policy, which took its origin in the times of feudal rigour. It first was punishing a man without giving him a trial or a hearing in his own defence, and then extending the punishment, which was due to the guilty only, to innocent persons, who could not possibly be concerned in the offence. For these reasons, the best informed writers of the present age had exerted their talents to place, in proper colours, the injustice and iniquity of such a system. He was happy to say that they had succeeded greatly in their endeavours, to enlighten legislators and statesmen on the subject, and consequently to mitigate the evils which had been brought upon so many nations by an adherence to it ; and he hoped that the day was not far distant, when the good sense and liberality of the people of *America* would abolish it entirely.\*

*Moultrie*, attorney-general, against the motion. By the common law, the widow of a person attainted of treason forfeits her *right of dower* ; and the reason of the thing speaks in support of the principle. For the common law goes upon the idea, that husbands are oftentimes influenced and governed by the sentiments and conduct of their wives. If, therefore, they do not exert this influence, by example and dissuasion, they are considered in the law, as having

\* These sentiments have very generally prevailed throughout *America*, for by the 3d article of the constitution of the *United States*, it is declared, "that no attainder of treason shall work a *corruption of blood*, or *forfeiture*, except during the life of the person attainted." And the 2d section of the 9th article of our state constitution, adopted in 1790, says, "that *no bill of attainder, ex post facto law*, or law impairing the obligation of contracts, shall ever be passed by the legislature of this state."

incurred such a degree of guilt, as to forfeit every right or claim under their husbands. It is true, that *Pendarvis* has not been convicted agreeable to the rules of the common law; and that there is no act in force which can affect her claim to dower, except the confiscation act passed in 1782. The policy of this law, he said, had been frequently called in question on other occasions, as well as on the present. He was no friend to acts of attainder in general, as they had given rise to shameful abuses and cruel extortions in other countries; and the influence of them had been felt by innocent descendants, long after the causes had ceased which gave rise to them. But in this country, he did not think that the one under consideration was founded on that barbarous system of extortion or persecution, which had been so often attributed to it. There were times and circumstances when such a measure was not only necessary, but perfectly justifiable. Such a period once existed in *South-Carolina*. It was well known, that in 1782, nearly all the coin in *America* had been drained out of it. In the public treasury there was none. The paper currencies, which had served to bear up the people for several years, under the pressure of the war, had ceased any longer to have a value. At the same time, a formidable army of the enemy were ravaging and laying waste the country. In this situation, without resources to raise men, or carry on military operations to check their career, what was to be done? To procure the means was the object, and the statesmen who regulated the public concerns at that day, saw the property of a very numerous class of the community protected, who had relinquished the defence of their country; many of whom had either taken up arms against it, or were aiding the enemy with their advice and counsel. It naturally occurred to them, that these men had forfeited every claim to the protection of the state, and every right of property they held under it. The precedent and example of other nations sanctioned the measure, and necessity justified it.

With regard to the legal effects and operation of the law, it is an act of attainder to all intents and purposes. The

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persons mentioned in the act had been guilty of treason. The offenders, however, were out of the reach of justice, and there was no possibility of bringing them to condign punishment. The act, therefore, extended the consequences of the offence to the only thing within their reach, to wit, their property, which very properly became a forfeiture to the state. In the confiscation act, there is no exception as to the claim of dower. If it had been the intention of the legislature, that it should have been saved to the widows of the persons mentioned in the act, it would have been *expressly* mentioned. In various acts of parliament *defining treasons*, and creating new felonies, (1 *Edw. VI. c. 12.* 5 *Edw. VI.* 5 *Eliz. c. 14.*) there are *express* reservations of dower to the widow, which confirms the doctrine, that unless there is an express reservation of the right, it is merged in the husband's forfeiture. In the 17th section of this act, there is a provision made for the wives and children of the persons therein mentioned, which is another corroborative proof that the reservation of dower was never in the contemplation of the legislature. Besides, the inconveniences would be great, were such a claim once admitted: for the state had warranted the titles to purchasers, against all claims and demands whatsoever. If, therefore, the door was opened, it would be productive of endless demands against the state, to make compensation for claims of this kind. It was the policy of the law to quiet possessions, and not to permit them to be called in question, after so great a length of possession by peaceable proprietors.

*Gaillard*, in reply, arraigned in a very animated manner, the policy of this act, as against justice and natural right, and contended, that as there had been no conviction of *Pendarvis* for treason, no forced construction could be given to the act, so as to effect the claim for dower. That the whole of the attorney-general's arguments rested upon the supposed intention of the legislature, which was not warranted by the terms of the law itself, as not one clause in it related in the smallest degree to the claim of dower. That this was a com-

mon law right. It was one of the most important which that ancient law secured to the female sex. Our forefathers had always respected it, and in their excess of caution expressly reserved it, when new felonies were created,\* though unnecessary; for it is a maxim of law, that the common law shall never be altered, by implication or intendment. And if the spirit of a former century could support this claim of dower, he hoped that we, their descendants, more enlightened than they were, would not be less careful in preserving the right.

*Holmes*, contra, admitted, that there was no express words in the confiscation act, which took away the claim of dower from the widows of the persons mentioned in the act; but contended, it was a fair inference or deduction from the whole scope and tenor of the act. The offence of treason, which was the offence the act intended to punish, wrought a forfeiture of dower; and when the offence was once declared by law, it was tantamount to a conviction, and all the consequences followed after. The intention of the legislature was, to transfer the property *completely* from the offender, and all claiming under him, to the state, exonerated from every charge, except *bona fide* creditors, and to that end a clause was inserted, which says, "The act shall be construed liberally, for effectuating the purposes in the bill," and the construction which this clause had in view, was such a one as would deprive the offenders, and all under them for ever, of the estate in question.

*Cur. adv. vult.*

And now, on the adjournment day of *May* term, 1789, all the judges present,

*The Court* were unanimously of opinion, that as there had been no conviction of *Pendarvis* for treason, in his life-time, there was consequently no forfeiture of dower at common law. And with regard to the confiscation act, there

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\* Stat. 1 Edw. VI. ch. 12. 5 Edw. VI. 5 Eliz. ch. 14.

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is no express attainder or declaration, that he had been guilty of treason, or any express words which can affect his widow's dower. The maxim, that penal laws are to be construed strictly, is a wise one. The court is not bound to give, nor will they ever give such a harsh construction to the act, as to deprive a widow of a common law right, when the act itself is silent upon the subject.\*

Let the writ of dower therefore issue.

Southern  
Circuit.KEATING and Wife *against* REYNOLDS.

.A. having two daughters, B. and C. devises to each of them, and to the heirs of their body for ever, certain personal chattels; but if they, the said B. and C. should die without having a lawful heir of their body to live, then he devised the said chattels to be "equally divided to the survivors." B. marries, and has issue now alive; C. likewise marries, and has a child born alive, but which dies a few days after its birth; and after its death, C. the mother, dies, without leaving any issue alive at the time of her death. This limitation over to B. is

THIS was another case from *Beaufort* district. The action was *trover* for sundry slaves, and the right of property turned upon the construction of a will, and the *limitation over* of personal chattels. The jury had found a special verdict, subject to the opinion of the court, as follows, viz.

"That *Samuel Thorpe*, in his life-time, duly made and published his last will and testament, bearing date the 6th December, 1777, and soon after departed this life. That in and by the said will, he gave and devised to his son, *Samuel Thorpe*, a tract of land, containing 500 acres; a house and lot in *Beaufort*, together with the fourth part of his stock of horses, cattle, &c. and twelve negro slaves, to wit, (*here naming them*), to be at the said *Samuel Thorpe's* own disposal at the age of twenty-one, and not before. But if the said *Samuel Thorpe* should die without issue of his body, then, and in that case, the said slaves and lands should be equally divided between his daughters, *Martha* and *Sarah Thorpe*, and their heirs for ever. That he de-

\* In the case of *Mrs. Wells*, who made a similar claim of dower, it was admitted, after full argument, although her husband had been banished for treason, and his estate confiscated. See 2d vol. page , so that the law on this subject may be considered as settled.

not a limitation over after an indefinite failure of issue; and therefore good.

“vised and bequeathed to his said daughter *Martha*, the  
 “fourth part of his stock of horses, cattle, &c. together  
 “with fourteen negroes, to wit, (*here also naming them*), to  
 “her the said *Martha Thorpe*, and the *heirs of her body for*  
 “*ever*. That, in like manner, he devised and bequeathed  
 “to his daughter *Sarah* another fourth part of his stock of  
 “horses, cattle, &c. with fourteen negroes, viz. (*here named*),  
 “to the said *Sarah Thorpe* and the *heirs of her body for*  
 “*ever*. But if the said *Sarah* and *Martha Thorpe* should  
 “die *with* (*out*, he intended, it is supposed) having a lawful  
 “heir of their *body to live*, then, and in that case, he gave  
 “and devised those slaves above mentioned, them and their  
 “increase, to be *equally divided to the survivors*.” The  
 special verdict further stated, that after the death of the said  
*Samuel Thorpe*, his son, *Samuel*, died under age and intes-  
 tate ; that after the death of *Samuel Thorpe*, the son of the  
 testator, the present plaintiff, *Keating*, married *Sarah*  
*Thorpe*, one of the daughters and legatees of the testator,  
 and that they had issue now alive. That *James Norris*  
 married *Martha*, the other daughter, and had issue born  
 alive, but which died a few days after its birth, and that  
 after the death of the child, *Martha*, the mother, died,  
 without leaving any issue alive at the time of her death ;  
 that at the time of the death of the said *Martha*, the said  
*James Norris*, her husband, was possessed of the negroes  
 and stock bequeathed to her, by her father, and soon after  
 sold part of the said negroes, to wit, *Adam*, *Hannah*, and  
 young *Adam*, to *Reynolds*, the defendant in this action, who  
 refused to deliver them up ; the jury, therefore, submitted  
 to the court, whether, upon the whole of the above facts  
 stated, the plaintiffs were entitled to the negroes in ques-  
 tion, or not ? That if the plaintiffs were entitled to them,  
 then they found for the plaintiffs ; but if not, then they  
 found, &c. for the defendant.

*Desaussure*, for the plaintiff, laid it down as a maxim in  
 law, that *in the construction of wills, the intention of the*  
*testator should be the guide*. That wherever that intention

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was manifest, from the words in the will, the words themselves, and the true meaning and import of them, ought to govern. But in cases of doubt and obscurity, courts would go great lengths, in order to effectuate the general intention of the testator, if consistent with law. To support this doctrine, he quoted 1 *Burr.* 50, 51. 233. 272, 3. 2 *Burr.* 1111. 3 *Burr.* 1581, 2. 1622. 4 *Burr.* 2249. *Cowp.* 31. That the intention of the testator was plain and evident from the tenor of this will. He obviously intended, that his children should possess his estate, in preference to strangers; and that in case of the death of either of them, without leaving children, that the share or portion of the child so dying without issue, should go over to the survivor. The words of the will, which evince the intention, are these; "But if the said *Sarah* and *Martha Thorpe* "should die with (*out*) (the syllable "*out*" being omitted "through a clerical mistake in the person who drew the "will) having a lawful heir of their body *to live*, then and "in that case he gave and devised those slaves above mentioned, and their increase, to be equally divided to the "survivors." From the phraseology of this clause, it is certain, that the will was not drawn by an accurate lawyer or draftsman, but it is sufficiently clear at the same time to show the testator's meaning, to wit, *that if either of his said children, or daughters, died without issue, the share of that daughter or child should go to the survivor.* This then being clearly the meaning of *Thorpe*, the testator, the only question for the court was, whether there was any rule of law against this limitation over to the *survivor*. Upon this last point, he conceded, that a limitation over of a personal chattel, *after an indefinite failure of issue*, was void. The policy of the law was against it, because of its having a tendency to create perpetuities in a chattel interest, which the law abhors. The cases in 2 *Black.* 398. and 1 *Peere Wms.* 290. were both in point against such limitations. But he contended, that if the limitation over be confined to such issue *as shall be living at the time of the death of the first taker*; or, if the limitation over is to take effect in the life-



*time of any person or persons then in being ; or if it is confined to a certain number of years, that then, and in either of these cases, the limitation was good, and such as the law will maintain. In these cases, the generality of the expressions, " heirs of the body," or " issue," which would look forward to an indefinite failure of issue, is qualified by being reduced to a certain number of years, or to a life or lives then in esse, &c. This doctrine is established and confirmed by a variety of adjudged cases. In the case of Lamb and Archer, (1 Salk. 225.) the testator H. devised a term for years to A. and to the heirs of his body, and if he die without issue living, then to B. The court held this a good limitation over to B. the contingency happening or arising within the compass of a life then in being. The present case then comes exactly within the rule of law laid down in that of Lamb and Archer. Here, he said, the limitation is to the issue of Mrs. Norris, living at the time of her death. But, in default of issue, then to the survivor, who is Mrs. Keating. The contingencies happened too in the life-time of Mrs. Keating, for both her sister and infant died while she was living. They were both in the compass of her life. So that in fact this limitation is confined to the issue of Mrs. Norris, living at the time of her death ; but on failure of such issue, then to take effect in the life-time of Mrs. Keating then living. So likewise in Fletcher's case, 1 Eq. Abr. 193. a devise of a term was to F. but if F. should die before the term expired, without having issue of his body then living, remainder over to D. This was held a good remainder. In this last case, the limitation over was upon this contingency ; if he die without issue then living, that is, at the time of his death, which is good, because the contingency must happen within one life, or not at all ; for upon his death it will certainly be known whether he leaves issue or not. If he does, the contingency cannot take place. If he does not, then it may ; and this being to happen within the compass of a life, is good as an executory devise. In Peere Wms. 534. A. devised his*

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personal estate to his two nephews, *B.* and *C.* and if either of them should die without children, then to the survivor. It was held that dying without children, must mean, *children living at the death of the party*; because the immediate limitation over was to the survivor, consequently the devise over was a good devise.

The other cases which were quoted as in point, and remarked on, were *Sheffield v. Lord Orrery*. 3 *Atk.* 283. 7. *Forth and Chapman*. 1 *P. Wms.* 663. *Atkinson and Hutchinson*. 3 *P. Wms.* 250. *Harman and Dickinson*. *Brown's Rep.* 91. *Duke of Norfolk's case*. *Fearne*, 354, 5, 6, 7, 8, &c.


*Holmes*, for defendant, admitted, that in the construction of wills, the intention of the testator ought to govern, unless the devise is contrary to the policy of the law; in which case the law was paramount to the will of the testator, and would control the intention. That the limitation in this case was only of the personal property. That chattels might be limited over in particular cases; but wherever it was after an *indefinite failure of issue*, it was too remote, and the property vested in the first taker. He cited and principally relied on the case of *Beauclerk and Dormer*, (2 *Atk.* 308.) The question in that case arose upon the construction of a clause in General *Kirk's* will. *Kirk*, in his will, says, "I make Miss *Dormer* my sole heir and executrix, and if she *dies without issue*, then to go to Lord *George Beauclerk*." A bill was afterwards brought by Lord *Beauclerk*, to have an inventory taken from the defendant, Miss *Dormer*, on oath, of all the personal estate of Gen. *Kirk*, and that the complainant's interest might be established by a decree of the court, and that the inventory might remain as evidence of the personal estate, in case the contingency should happen. But Miss *Dormer* refused it, and insisted that she had an absolute right both to the real and *personal* estates, and that she was not obliged to account. Lord *Hardwicke* held, that the limitation over was void, and cannot be confined to the defendant's dying with-

*out issue living at the time of her death*, and therefore dismissed the plaintiff's bill. In the above case, the same grounds were taken for the complainant, as those relied on by the plaintiff in the present case ; namely, that it was the intention of the testator, that if the defendant died *without issue living at her death*, that then Lord George should take. And it was contended, that the *vulgar* meaning of the words "dying without issue," had always been regarded by the court, as having no issue at the time of the death. Yet the Lord Chancellor said, "I do not think the construction contended for on behalf of the plaintiff, is supported by any one case whatever ; and therefore as the words in the will are *general and unrestrained*, the limitation over must be void." So likewise it was contended, that the words in *Thorpe's* will were general and unrestrained ; that they comprehended and took in a whole generation ; that they were like *heirs of the body*, which created an *estate-tail*, and extended not only to the immediate issue, but to all who might descend from her from generation to generation. Consequently, the limitation over was too remote, and not warranted by the rules and policy of the law. The case of *Reid v. Snell*, 2 *Atk.* 647. is also in point, where it is laid down, that a limitation over after a *general dying without issue*, is bad.

*Pinckney*, on the same side, urged, that all the cases cited for the plaintiff related to *implied estates-tail*, and not to *express* ones. That this was an express estate-tail, and being of a personal chattel, vested the property in the *first taker*. *Fearne*, 345. 1 *Vez.* 154. 2 *P. Wms.* 290. *Daw v. Pitt*, *Fearne*, 347. *Brown's Cha. Rep.* 170. 188. But considering the estate as a conditional fee, still the condition was *performed by having issue*, which vested the property absolutely in Mrs. *Norris*, the devisee. The language of the law on this occasion, was simply and plainly this. That the testator meant to give the negroes in question to his daughter *Martha*, *provided she had issue*. She had issue. Consequently, the condition upon which she

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was to have the estate being performed, the property absolutely vested in her upon the performance. That even if the limitation over was good *originally*, yet the marriage of *Martha*, and her having issue, destroyed it; and it would be against the rights of marriage to deprive the husband of the property acquired by his wife.

*Rutledge, in reply.* It is certainly the duty of the court to support the intention of the testator, if it is clear. In this will there is a *double contingency*, to wit, the dying without issue by Mrs. *Norris*, and a survivorship of Mrs. *Keating*. With respect to the first, it is clear, that the dying without issue, ought not to be construed, an *indefinite* failure of issue; but a dying without issue *living at the time of her death*. The words are, "but if the said *Sarah* or *Martha* should die without having a lawful heir of their body *to live*, then, and in that case, to the survivor." The words, "to live," plainly mean, *living at the time she should die*, or at the *time of her death*, and clearly qualify the generality of the expressions, "dying without issue," which brings this case within one of the rules of law, mentioned by the first counsel, to wit, that the limitation was good, if confined to such issue as should be living at the death of the first taker. The word "*then*," which immediately follows the words "*to live*," is a word of reference, and confirms this construction, as it relates back to the determination of the first estate, or contingency, and commences the sentence which carries the property over to the second contingent person, Mrs. *Keating*, then living, which carries this case also under the second rule first laid down by his colleague, to wit, "that the limitation is good, if to take effect in the life-time of any person then in being." In support of this legal position, 2 *P. Wms.* 686. *Duke of Norfolk's case*, *Cowp.* 9. 600. 1 *Eq. Ca.* 193. 1 *P. Wms.* 534, &c.

The judges took time to consider this case, and afterwards, on the adjournment day of *July* term, 1789, delivered their opinions.

GRIMKE, J. said he had been so much indisposed during the argument, as to have been unable to give the case the attention which it merited. He had, however, perused the opinion of *Waties*, J. and concurred with him, for the reasons he assigned.

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WATIES, J. Personal estates may be limited over, as well as real estates, provided such limitation has not a tendency to create a perpetuity. Every thing, therefore, depends upon the remoteness of the contingency. In the present case, I am of opinion, that the limitation is good, being within those reasonable bounds which the policy of the law has prescribed. To my mind, there are two things for the consideration of the court. First, the intention of the testator ; and, secondly, whether the law will carry that intention into execution. As to the first point, it is very evident that the testator intended to benefit his own children, and that his estate should go to them in preference to strangers ; and that in case of the death of either of them, without issue, it should on that event go over to the survivor. As to the second point, whether the law will carry such intention into effect, I admit, that if the intention is not consistent with the rules of law, the court could not effectuate it. Moreover, that if there were no words in the will controlling the general words creating an estate-tail, the legal doctrine must prevail, and the property would vest in the first taker. And further, that the testator's intention to control the general words must be *express*, or arise by strong implication. 2 *Vez.* 642. Having consented to and laid down these general positions, I proceed to examine the will. The will gives the negroes in question to *Martha Thorpe*, but upon the contingency of her leaving no *children*, (for the words "*heir of her body to live*," mean *children*, if they mean any thing,) then to the *survivor*. This term "*survivor*" is a term of much import here. It carries with it the idea of the longest liver, provided the other sister should leave no children behind her ; that is, none living at the time of her death, for if

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she had left a child, that child, or those claiming under it, must have taken. But as there was none living, then she who should survive, was the person to take. This, then, is not a limitation depending upon a remote, but a very limited contingency. One which was to happen in a very short period, during the life of a person then living, and cannot be called a limitation, after an *indefinite failure of issue*, to a person not then in *esse*. One of the best rules for construing wills is that laid down in *Doug.* 327. to wit, "If a testator makes use of legal phrases, or technical words *only*, the court is bound to understand them in the legal sense. They have no right to say that the testator *did not understand them*, or to put a construction on them different from what has long been received, or what is affixed to them by law. But if a testator use other words, which manifestly indicate what his intention was, and which shew that he did not mean what the technical words import, the intention must prevail, notwithstanding he has used technical words, in other parts of his will." In the present case, it is true, that the words "*heir of her body*" are mentioned; and if they stood alone, and unqualified by any other words, explanatory of the testator's intention, they would create an estate-tail; consequently, the limitation would be too remote. But the words "*to live*," immediately following the foregoing words "*heirs of her body*," shew that his idea was *children living at her death*: and the limitation over, upon the contingency of her leaving no children, to the survivor is a sufficient description to the person he meant should take, so as to bring this case within the rules of law in support of the limitation. A devise to the survivor is of itself sufficient to support the limitation. *Fearne*, 358. The cases I rely on are 2 *Vez.* 642. 10 *Mod.* 403. *Lamb and Archer's case*, in *Salk. Cha. Rep.* 170. *Fearne*, 363. and upon looking into them, and considering all the circumstances of this case, I am clearly of opinion, that the limitation over to *Sarah*, the surviving daughter, is a good one, and the plaintiffs ought to recover.

DRAYTON, J. observed, that this was a case of considerable importance and difficulty. Great judges had entertained different opinions as to the doctrine of limitations over ; and he hoped this would be a sufficient apology when he was about to say, that he differed from his brethren in this case. From the best view he had been able to take of it, he said, it struck him in a very different light to what it had done them. Two questions presented themselves to his mind. First, whether the limitation over was good or not ? Secondly, whether the survivorship was not restricted to the dying without issue, and under twenty-one years of age ? The law, he observed, was clear, that a limitation of a chattel over after an indefinite failure of issue, was void. He conceded at the same time, that in the present case, the limitation over did not appear to be too remote. For although the general words in the will, appeared to be *after an indefinite failure of issue* ; yet the subsequent controlling words restricted them, and made it a good limitation. On this point he agreed with his colleagues ; but on the second point, he differed from them entirely. He conceived the words here, shewed that the testator intended the survivor should only take, in case of a dying without issue, generally, or under twenty-one years of age. This would appear by an examination of the clause which relates to the son. In that clause the estate was to be at the son's disposal, *at the age of twenty-one, and not before*. So with regard to the daughters, the same rule of construction ought to be given ; that the negroes were to be at their disposal at the age of twenty-one, and not before ; and if either of them died before that time, without issue, then to go over to the survivor. But *Martha* arrived to the age of twenty-one years and upwards, and, therefore, the contingency could not happen. The right of survivorship was done away on her coming of age, and marriage ; of course, the property vested in *Norris*, in right of his wife. The authorities he remarked and relied on, were *Stringer* and

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*Philips*, 1 *Eq. Cas. Abr.* 292. *Rose and Hill*, 3 *Burr.* 1885.  
*Hawes and Hawes*, 1 *Wils.* 165. 3 *Bac.* 438.

The *postea* was, therefore, delivered to the plaintiffs.



### The Executor of BUSH *against* The Trustees of WARING.

To give a *bona fide* assignment, made for the general benefit of creditors, a priority over a judgment, it is not necessary that it be recorded.

THIS was a feigned action brought against the trustees of the defendant, to try whether certain property, which had been assigned to them by him, for the benefit of all his creditors, should be liable to the plaintiff's execution or not; he having obtained a judgment against *Waring*.

The facts were these. Previous to the late war, the defendant was in affluent circumstances. He had contracted considerable debts, but not out of proportion to his property. During the war, his property suffered much; so that in the year 1787, he found it inadequate to the payment of his debts. Desirous to close his embarrassments, he came forward to his creditors, with a statement of his losses and present circumstances, and proposed to surrender up all his property to trustees, for the benefit of all his creditors, and obtain from them discharges. Most of them finding that nothing was secreted, and no improper intention manifested in his conduct, agreed to accept of his proposals. A general assignment of all his property, for the benefit of those creditors who would accept upon the terms mentioned, was accordingly executed in *October*, 1787, and most of his creditors signed and sealed the same. The plaintiff refused, and obtained judgment on the 22d *November*, 1787. The assignment was not recorded till judgment was obtained.

*For the plaintiff*, it was contended, that the assignment was fraudulent and void, under 13 *Eliz.* c. 5. That the



judgment would have priority, because the deeds were not recorded until after it was duly entered up of record.

*For the defendant*, it was answered, that these deeds were not made in secret, but were advertised in the gazettes, and the different creditors called on to assent and sign them. That the statute of *Elizabeth* was made to vacate such deeds as conveyed *debtors'* property to other persons, to *defraud creditors*, but not to destroy deeds which convey *to*, and not *from them*, for the joint benefit of all. Such is justice, and not fraud. The case is divided into two questions. First, whether a debtor can lawfully dispose of his property, for a fair purpose, before any judgment is entered against him ; and second, whether it is necessary to record the conveyance by which such fair disposition is made, in order to preserve the priority which the date gives over judgment by creditors. On neither of these questions can the court entertain a reasonable doubt.

*The Court* heard with attention the arguments, and were clear and unanimous, that a *bona fide* assignment made, not for *partial* but *general* benefit of all the creditors, and comprehending all the debtor's property, is not fraudulent, but highly beneficial and equitable to creditors. The plaintiff had no lien at the time of assignment. His judgment was obtained after. The act of assembly gives priority to the first recorded *sale* or *mortgage*, but is silent as to judgments. Neither the reasoning nor law applies. The assignment must be supported.(a)

*Pinckney*, for plaintiff.

*Rutledge* and *Desaussure*, for defendant.

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(a) See the case of *Penman v. Hunt*, 2d vol. Also the case of *Ashe v. Executors of Ashe*.

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**EVELEIGH against the Administrators of STITT.**

Although the rule of law is, that the value of the thing at the time of eviction or recovery, shall be the measure of damages; yet, under very peculiar hardships, a jury may lessen them, according to the circumstances and justice of the case.

**THIS** was an action on a warranty, in order to recover the value of sundry negroes, sold by the deceased *Stitt*; and which, by a title paramount to that under which he held, had been recovered in an action against the plaintiff, by the trustees of Mrs. *Huxam*.

The case was briefly this. During the war, while paper money was in a rapid course of depreciation, *Baker*, the former husband of Mrs. *Huxam*, sold the negroes in question to one *Phepoe*. *Phepoe* soon after sold to *Burke*, who sold to *Stitt*, who again sold to the plaintiff *Eveleigh*. In the whole course of these transactions, no money was paid, but bonds given by the different purchasers for the purchase money: nor was any possession given of the negroes, till the present plaintiff got them from *Baker*. Soon after the peace, Mrs. *Huxam*'s trustees brought an action against the present plaintiff, who was then possessor, and recovered them; they having been settled on her by *Baker*, previous to their marriage. This occasioned the present suit against the estate of *Stitt*, and the only question of difficulty which arose was, what should be the measure of damages? whether the value of the negroes at the time they were sold, or their value at the time they were recovered from *Eveleigh*?

The case being a new one, and a kind of speculating contract, out of the usual course of things, without any consideration passing from the buyers to the sellers, and without any view to the use and labour of the negroes; and one which was likely to fall extremely hard on *Burke*, the only ostensible person in the country, *Phepoe* having gone off; and *Baker*'s estate not sufficient to make good the loss;

*The Court*, under the peculiar circumstances of the case, left it to the jury to give what they thought reasonable.

*The Jury* accordingly allowed the average price of the negroes, between the first and last sale, according to the scale of depreciation, with interest on that sum till the time of verdict. In this verdict all parties acquiesced.

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*Moultrie*, for plaintiff. *Pringle*, for defendant.

In the course of the arguments, the case of *Liber* and wife against the executors of *Parsons*, (*ante*,) was relied on, as in point for the plaintiff, for the full value of the negroes. And in reply, it was acknowledged, that the doctrine laid down for the plaintiff in that case, was the general law with regard to damages. But that this was an exception to the general rule, on account of the peculiar circumstances under which these different contracts were made, and the extreme hardship of the case should it fall on *Burke*, who had never gained a shilling by it, and who was the only person left to make good whatever damages might be given.

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AN information was filed in this case, by the attorney-general, on behalf of the state, against seven negro slaves, seized by the plaintiff, a revenue officer, on the ground that they had become forfeited, being imported contrary to the directions of the act of the legislature, in that case made and provided.

The claim interposed by the defendants, was on behalf of the two infant children of Mrs. *M'Claws*, one of four and the other of eight years of age, to whom the negroes belonged, and for whom she (Mrs. *M'Claws*) was a trustee.

Statutes passed against the plain and obvious principles of common right and common reason, are null and void, as far as they are opposed to such principles.

The Judges are bound to give such a construction to acts of the

legislature, as is consistent with justice and the dictates of natural reason, though contrary to the letter of the law. Negroes, therefore, brought into this state by actual settlers, after the passing of the instalment law of 1788, under the sanction of the former law of 1787, before such actual settlers could possibly be informed of the law of 1788, are not liable to forfeiture, though no express proviso be in the act for that purpose.

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From the examination of sundry witnesses, it appeared, that the claimants had been, for some time previous to the seizure, settlers at the *British* settlement on the Bay of *Honduras*; but in consequence of a great scarcity of provisions, which had nearly produced a famine in that place shortly before their arrival here, they had been induced to leave the settlement, and come to *Carolina* with a view of actually settling. It further appeared, that previous to their sailing from the bay, (about the latter end of *August* or beginning of *September*, 1788,) they had taken much pains to inform themselves whether there was any law of force in this country which prohibited them from taking along with them, the negroes belonging to the children, and were informed, that provided they went as *actual* settlers, there was no law which would operate against them; but if negroes were taken for sale, they would become forfeited. That under these assurances, they embarked.

On the part of the prosecution, it was contended, that whatever might have been the assurances or impressions of the claimants, at the period these negroes were removed into this state, they became forfeited to all intents and purposes, by virtue of the 16th clause of the instalment act passed the 4th of *November*, 1788; which is in the following words: "That no negro or other slave shall be imported or brought into this state, either by land or water, on or before the first day of *January*, *A. D.* 1793, under the penalty of forfeiting every such slave or slaves, to any person who will sue or inform for the same; and under the further penalty of paying 100*l.* to the use of the state, for every such negro or slave so imported or brought in. Provided, that nothing in this prohibition contained, shall extend to such slaves, as are now the property of citizens of the *United States*, and at the time of passing this act shall be within the limits of the *United States*." The only exception in this clause, it was said, was with regard to negroes, the property of the citizens of the union, and within the limits of the *United States*, on the day of the ratifica-

tion of the act. That the negroes in question did not come under the description of those contemplated by the proviso in the clause of the above act. They were not within the *United States* on the day the act passed; nor were they the property of the citizens thereof, but the property of *foreigners*, and imported into the state, since the law was enacted, contrary to the intent and meaning of the same. That it was the policy of the law to shut the door effectually against the importation of slaves, under any pretext whatever, by foreigners, or from foreign countries. And it was so framed, that no other construction could be given it.

*On behalf of the claimants*, it was urged by their counsel, in reply, that it would be one of the hardest cases ever decided in a court of justice, were the negroes in question taken from the children to whom they belonged, with the additional forfeiture of seven hundred pounds sterling, besides the loss of property. They called the attention of the court and jury to the former act of assembly, prohibiting the importation of negroes, passed on the 28th of *March*, 1787. The ninth clause of this act, they observed, prohibited the importation of slaves, under the pain of *forfeiture* only; but there was an express proviso in it, that the penalty of the act should not extend to the negroes of transient persons or travellers, passing through the state; *nor to the slaves of persons coming to settle and reside within the state*, who should not sell them within one year after their arrival within it. That the act of 1787 remained in full force till the act of the 4th of *November*, 1788, was ratified. It was, therefore, under the sanction of the proviso in the former act, that the claimants left the Bay of *Honduras*, with a view of residing in this state. They left the settlement on the bay about the latter end of *August*, or beginning of *September*, 1788, and never arrived in the port of *Charleston* till within a few days after the 4th of *November* following. It was, therefore, impossible for them to have known of this latter act, as they were, on the day it passed, on the high seas, on a lawful voyage, and with a lawful intent, that of becoming citizens and settlers in *South-Carolina*,

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under the authority of a law which they had been informed of before they embarked. To deprive them, therefore, of their property under these circumstances, and subject them to so heavy a penalty in addition to it, would be such an act of injustice as the legislature never could have intended. It would be contrary to common right to give the act such a construction. It would be no less than holding out a boon to decoy with one hand, in order to strike a fatal blow with the other. The act of 1787, held out allurements to persons to come and settle in our country, and bring their negroes with them. The act of 1788, if the rigid construction was given it, which is contended for, without allowing sufficient notice for persons to be informed of it, would be calculated to ruin the unsuspecting stranger who had reposed confidence in our government, and promised himself protection under its act of 1787. That therefore the intention of the legislature must have been to exempt those negroes from forfeiture, who were upon the way, or on the point of arriving in the state, under the sanction of the former law, when the latter act passed, though not expressed in the words of the law itself, otherwise it would be chargeable with manifest injustice, which is not to be supposed from a body of sage legislators. Nor could they ever have intended the penalty for travellers passing through the state, or persons in distress, as were the present claimants, persons retiring from a place threatened with famine. That at all events the act was obscurely penned, and not guarded sufficiently, to prevent injustice, if the letter was to govern the construction. It was, therefore, the duty of the court, in such case, to square its decision with the rules of common right and justice. For there were certain fixed and established rules, founded on the reason and fitness of things, which were paramount to all statutes; and if laws are made *against* those principles, they are null and void. For instance, statutes made against *common right and reason*, are void. 8 *Rep.* 118. So statutes made against natural equity are void; and so also are statutes made against *Magna Charta*. *Ibid.* 118.

They further contended, that the judges were bound to give such a construction to acts, as would comport with the intention of the law makers ; and that this intention was to be collected, sometimes from the *cause*, or necessity of making the act, and sometimes from foreign circumstances. When this *can be discovered*, it ought to be *followed* with *reason* and *discretion* ; although *contrary* to the *letter* of the act. *Bac.* 648. That they were also bound to construe statutes, *according to equity*. *Ibid.* 649. They compared this case to the statute of *Elizabeth*\* in *England*, which makes it felony to export sheep out of the kingdom. In this act, there is no exception as to a ship's live stock, proceeding on a voyage to foreign countries ; yet the judges of *Westminster-Hall*, in the construction of this act, never considered the enacting clause as extending to masters of ships or vessels, carrying away sheep with them for that purpose. And commanders of ships, have uniformly carried out of the kingdom, sheep with them from the days of queen *Elizabeth* to the present day. It was said, that if the letter of the statute of *Elizabeth* had been attended to, and not the spirit and intention of it, it would have been felony. But the judges gave an equitable construction to it, by saying that the parliament only intended to prevent the exportation of sheep to foreign countries *for sale* ; and not to deprive mariners on long voyages of the benefit of fresh provisions. So in the present case, the judges ought to give as equitable a construction to this clause of the act of 1787, by saying that it never was the intention of the legislature of this state, to direct a forfeiture of negroes brought into the country under the sanction of a former act, *before it was possible for the party to be apprized of the subsequent one*. Such a construction would be consistent with the principles laid down in the authorities cited ; while a contrary one would be rendering the law subservient to the purposes of palpable injustice and oppression. The policy

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\* 1 Vol. Statute at large,

1789.

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v.  
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wife.

or necessity of passing this law, was doubtless a wise one, as it was intended to prevent the importation of slaves *for sale* : but foreign circumstances loudly called for an exception in favour of the claimants, who could not possibly be supposed to be guilty of any wilful breach of the law in question ; and appealing to the justice of the court, under those circumstances, it was urged, their good sense and discretion ought certainly to induce them to give a construction favourable to their claim.

*The Court.* It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as *far as they are calculated to operate against those principles*. In the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be *evidently against common reason*. But we would not do the legislature who passed this act, so much injustice, as to sit here and say that it was their intention to make a forfeiture of property brought in here as this was. We are, therefore, bound to give such a construction to this enacting clause of the act of 1788, as will be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law ; and this construction is, that the legislature never had it in their contemplation to make a forfeiture of the negroes in question, and subject the parties to so heavy a penalty for bringing slaves into the state, under the circumstances and for the purposes, the claimants have proved.

Present, GRIMKE, WATIES and DRAYTON, Judges.

*The Jury* accordingly gave a verdict for the claimants.

*The Attorney-General, Desaussure, and Ford*, for plaintiffs.

*Rutledge, Pringle, Holmes, and Bay*, for claimants.



M'CLURES *against* HAMMOND.Feb. 27th,  
1790.


**SPECIAL** action on the case against the defendant, as a common carrier. The defendant had been employed by the plaintiffs to bring round to *Charleston*, from *Augusta*, in *Georgia*, a quantity of tobacco, which had been shipped on board of his boat employed in that trade. On the passage from *Savannah*, the boatmen anchored near the outside of an island on the coast, called *Pinckney's* island, where, owing to the want of a good anchor, and a tarpaulin, she drifted on shore and filled with water. In consequence of it, more than one half of the cargo was damaged or lost.

Carrying goods for hire, makes a man a common carrier under the custom; who is answerable for any loss arising from the want of care, skill or diligence.

On the trial it was proved for the plaintiff, that the tobacco was put on board the boat in good order; and that at *Savannah*, the defendant or his agents, were cautioned against going along the coast, without a heavier and better anchor, and a good tarpaulin to keep off the spray of the sea. That when the boat came to anchor off *Pinckney's* island, and the tide turned against her, it was found that the anchor was much too light to hold so heavy a boat. Shortly after she drifted on shore, and having no tarpaulin to cover her hatchway, she soon filled with water. It further appeared in evidence, that if the boat had been provided with a proper anchor, she would have rode in safety till the tide turned; or, if she had had a proper pilot on board, the boat might have come within the islands, along the inner passage; where she would have been perfectly safe, with the anchor she had.

The defendant attempted to prove, that the boat was driven on shore by tempestuous weather, but on the cross examination of the witnesses, it appeared that the wind was no more than a fresh sea-breeze, and such as was common in these latitudes at that season of the year.

*The defendant's counsel*, in this case, relied principally upon the circumstance of the boisterous weather, which


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they contended would excuse a common carrier. 1 *Str.* 128. That the boat was as well found as the boats in the same trade usually were. That she was manned with skillful boatmen, and every thing was done by the defendant which was incumbent on him to do for the preservation and safe carriage of the tobacco.

*For the plaintiffs, in reply,* it was urged, that whoever carries goods for hire or for freight, is considered in law as a common carrier. (1 *Bac.* 243. *Bull. N. P.* 70.) As masters and owners of ships, lightermen, hoymen, boatmen, stage-coachmen, &c. Therefore, on account of the hire and freight they are chargeable for all faults arising from the want of *skill, care or diligence*, to the party injured. 3 *Black.* 103, 4. Nay, so strict is the law against common carriers, that if a ship, boat, or vessel be robbed *at night*, the master or owner shall be liable. 1 *Bac.* 245. It is a rule, says *Blackstone*, that every common carrier, engages by law, to be answerable for goods he carries, at all events. 3 *Black. Com.* 163, 4. Nothing shall excuse them, but 1st. the act of God, or 2d. enemies. *Bull. N. P.* 70, 1, 2. Lord *Raym.* 909—918. As to the latter, none were pretended here, and as to the former, it appeared from the evidence, that the breeze was not more than every man of common foresight could have guarded against; or, by having a proper pilot on board, the boat might have been conducted in safety without being exposed to the sea. Then there was certainly some want of *skill* in not conducting the boat through the proper channel, or a want of due *care and diligence*, in not providing the boat with a proper anchor and tarpaulin, either of which made a defendant liable.

*The Court*, in charging the jury, said, that whoever carries goods for hire, makes himself a common carrier under the custom, and the law was very clear, that nothing should excuse a common carrier, but the act of God or enemies. The latter were not pretended. It depended upon the jury to determine from the evidence, whether this

was an unavoidable accident, owing to tempestuous weather, or which could not by due skill, care or diligence, be guarded against ?

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The jury found for the plaintiff, the supposed value of the tobacco lost, 100%.

A new trial was afterwards moved for, before GRIMKE, WATIES and DRAYTON, Justices ; when after solemn argument, it was refused, on the ground that here were matters of fact very proper for the consideration of the jury. That the verdict was by no means against evidence, as the weight of it was in favour of the plaintiffs ; nor against law, for that was equally clear with the plaintiffs, unless the defendant had brought himself under one or other of the reasons, which will excuse a common carrier, of which the jurors were judges from the evidence.

Therefore rule discharged.

*Pringle and Bay*, for plaintiffs.

*Rutledge and Taylor*, for defendant.



### HAMMOND against M'CLURES.

August 28,  
1790

SHORTLY after the preceding cause was determined, *Hammond* paid off the judgment, and brought this action against the defendants, for the *freight* of the tobacco.

For the plaintiff, it was urged, that as the defendants in their action against *Hammond*, had been satisfied for the damages the tobacco had sustained, it was tantamount to a safe delivery ; and there could be no question but what he would be entitled to his freight. It was a well known rule

Where a common carrier pays damages for the loss of goods by negligence or unskilful management, it is tantamount to a safe delivery, and he is entitled to his freight.

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~~~~~  
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of law, that where any part of a cargo is delivered, freight is due for such part, and if an underwriter paid loss on a policy of insurance, he always kept the premium. From whence it was inferred, that as part of the cargo was delivered sound, and the rest paid for, which was equal to the delivery, freight for the whole was due, and ought to be paid.

*In reply*, it was said by the defendants' counsel, that the jury in calculating their damages in the former action, had not given more than about one half of the value of the tobacco lost; which rendered it highly presumable that they had taken the freight into consideration, and deducted the amount from the damages the defendants suffered. At any rate, the loss in the former case was owing to the plaintiff's own negligence, and to recover freight on that part which he negligently lost, would be suffering him to take advantage of his own wrong.

WATIES, J. As the damages found in the former action have been paid by the present plaintiff, it is the same as if the tobacco had been delivered, and he is entitled to a recovery of his freight. Had the jury, in the former case, given less damages than the defendants really suffered or proved, it might have been a ground for a new trial on their part; but so far from desiring a new trial, they opposed it.

*Verdict* for plaintiff.



June, 21,  
 1790.

HIMELY *against* WYATT and RICHARDSON.

Goods of a stranger sent to a vendue store for the purpose of being sold at public vendue, are not distrainable for rent.

THIS was an action of replevin, which came on upon a demurrer. The facts set forth in the pleadings, were, that *Jacob Cohen* was a licensed vendue-master, and had rented a store of the defendants, which he used as a vendue store. The plaintiff had sent to *Cohen* a quantity of goods, wares

and merchandise. Before the sale, *Cohen* was taken on a *capias ad satisfaciendum*, and arranged his affairs for taking the benefit of the act for *insolvent* debtors. The defendants, his landlords, distrained for rent in arrear, on all goods in the store, and amongst the rest, were those of the plaintiff's, and insisting they were liable, refused to give them up. The plaintiff *replevied* in form, and the question was, whether these goods sent to a vendue store for the purpose of selling at public vendue, were, or were not, legally protected from distress.

*Ford*, for the plaintiff, said, that the goods are the implements of the tenant's trade, the medium of his support; that about which his common occupation is constantly concerned. That the goods were in a vendue store, a common market, a public place, known and established in law. That public utility and convenience to the community require they should be protected, and vendues encouraged.


*Taylor* replied, and insisted upon the common law right given to landlords, to distrain whatever could be found upon the tenant's premises, without regard to the claims of third persons. That though there were exceptions, there was not any which exempted goods in a vendue store, reported here or in *England*.

WATIES, J. This is a new case, but I feel no difficulty in forming an opinion on it. There is no precedent which says the goods of a stranger are not distrainable for rent, but the exemption is reasonable on general principles. The law of distress would be greatly perverted, if it were made to operate on goods circumstanced as these. The reason why a stranger's goods are subject to distress, is, because infinite frauds would be otherwise practised on a landlord; and his summary remedy in this case, might at any time be defeated, by a collusion between his tenant and a stranger. All goods, therefore, found upon the premises, belonging to strangers or tenants, are generally distrainable. They are presumed to be the property of the

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 Richardson.

tenant, because in his possession. There is no instance in which possession is regarded, so much as the evidence of property as in this, to preserve the right of the landlord from fraud and imposition. This appears to be the sole object of the law, and, therefore, admits of exceptions, when this mischief does not occur. For where the possession of the goods by the tenant holds out no fallacious security to the landlord, but are known to belong to a stranger, in that case they are privileged from distress : as in the case of a horse at an inn, or in a smith's shop to be shod ; cloth at a taylor's, and sacks of corn in a market or mill, &c. These are privileged and protected for the benefit of trade, but in my mind, it is as good a reason, that the property (notwithstanding the immediate possession is in the tenant) is known by the landlord *not to belong* to the tenant, but to his customers. No presumption of property can arise from the possession ; and, therefore, the landlord is not deprived of any security, he might have trusted to in them, for the payment of the rent. With respect to the present case, all the different reasons for an exemption, apply with great force. The defendants when they leased their house to the vendue master, could never have had in contemplation, any remedy they might have against the goods of various persons which might be lodged with him for sale. They must have known that these were not his property, and must have relied on other resources for the recovery of their rent. Considering then, the well known use of vendue stores, as the depositories of the goods of strangers only, and which are placed there as it were, by the authority of law, and considering also, the public convenience and utility of them, there appear to me the strongest grounds for extending to them the protection of the law.

*Judgment* for the plaintiff.


DAVIS *against* the Executors of RICHARDSON.August 26,  
1790.

CASE to ascertain the value of an indent, tried before a special jury in *Charleston*. The action was brought on a contract in writing, dated 17th *February*, 1784, which stated, that the *deceased Richardson* had borrowed of the plaintiff an indent for 869*l.* 1*s.* 6*d.* which had been issued to him, for his services as an officer in the state troops, and in which *Richardson* promised to repay that sum, in general indents with interest. At the time of the contract, general indents were worth only 10*l.* for 100*l.* but in consequence of the prospect of the adoption of the funding system by congress, they had risen in value up to 6*s.* 8*d.* in the pound, which was the current value at the time the action was commenced. The question was, what sum the plaintiff ought to be allowed, whether at the rate indents bore at the time the note was given, or the current value when they were demanded by the commencement of the action.

Where a contract is entered into for delivery of indents, the value of them at the time fixed for delivery, is the sum the plaintiff is entitled to. But where no time is mentioned for delivery, nor demand proved, the value at the commencement of the suit, and interest on that sum, is the rule of estimation.

*For the defendants*, it was said, that if *Richardson* had purchased indents for cash in 1784, he could have procured them at the rate of ten for one; and that the plaintiff could not have got more than one-tenth of the nominal value, if he sold them. That this value must have been in contemplation of both parties, at the time the indent was lent. To allow this value, therefore, with interest from the time of the loan, was as much as the plaintiff in conscience and justice had a right to demand. It was further urged, that if they had fallen lower in value, *Richardson* would have been bound to make good what it was worth, when he received it; and, upon the same principle, the plaintiff was not entitled to more than it was worth when he parted with it.

*For the plaintiff*, in reply, this contract was compared to one for the sale or transfer of stock, where it is very clear, that if the transfer is not made on the day stipulated for, the

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value of stock on that day, and not on the day the contract was made, must be paid. 1 *Bac.* 70. 2 *Vern.* 394. *Prec. in Chan.* In the present case, an indent (which is *Carolina* stock) was borrowed, and the contract is to repay in *indents*, not in money. It was therefore exactly similar to the sale or contract for stock in *England*. That in all cases, where a specific thing or property of any kind is to be delivered, and the party fails in delivering it, the value of the property at the time of the delivery, and not the value at the time of contract, is the true and governing rule of estimation. Because, then it is, that the party sustains the injury by non-delivery. For, if the thing contracted for, had been delivered agreeable to contract, the other party could have got the current price for it. That in this respect it may be compared to a warranty, where, if the thing warranted be recovered from the purchaser, the value at the time of the recovery or eviction, and not the value at the time of the purchase, shall be recovered from the seller. 1 *Dom.* 77. That although in the present case no time is fixed for the delivery of the indent, yet the suit is a good demand. It is a rule in covenants, that if no time is fixed for performance, a demand will hasten the obligation of the party to perform.

*Per Curiam.* This is not a case of difficulty in settling the principle, but it is of extensive importance to the community, that the principle should now be settled and ascertained with precision. A great number of contracts in every part of the state, depend upon the determination of this question: and it is fortunate, that so respectable a jury are convened for the purpose of fixing a standard for future decisions. The law is certainly in favour of the plaintiff. Wherever a contract is entered into for the delivery of a specific article, the value of that article, at the time fixed for delivery, is the sum a plaintiff ought to recover. As in this case, however, no time is mentioned for delivery or repayment, nor any demand proved, the commencement of the suit must be considered as the demand, and the value of the



indents at the time of the commencing the action, with interest, is the true and proper rule of estimation.

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Richardson.

The jury found accordingly.

Judges GRIMKE, WATIES, and DRAYTON, present.


Lessee of RUGGE against ELLIS.

August 27,  
1790.

THIS was an action of ejectment brought by the plaintiff, to recover a house and plantation, called the *Quarter-House*.

The case was, that the plaintiff having occasion to be absent from this state for a short time, had constituted his brother, his attorney and agent during his absence. His brother, for him, and on his behalf, contracted with the defendant, to purchase the premises in question; and an agreement in writing (which the plaintiff now contended to be a *complete* conveyance) was made under seal, in presence of witnesses, the deed bearing date 10th *August*, 1785, which was in substance as follows: "That for and in consideration of 3,000*l*. the receipt whereof he thereby acknowledged, did *grant, bargain, sell, and convey*, to the said *William Rugge*, and to his heirs and assigns for ever; all the old *Quarter-House* tract, &c. (*which was set forth and described* :) also, 150 acres of land, more or less, commonly called the new *Quarter-House*, &c. (*also set forth and described*.) And the said *Richard Ellis* did thereby bind himself, his heirs, executors, administrators and assigns, to make such other good and lawful titles, as should be required, for the purpose of vesting in the said *William Rugge*, his heirs and assigns for ever, a free, clear, and absolute estate, in fee-simple; and did covenant to warrant and de-

A bargain and sale is a good conveyance under the statute of uses, to pass a fee, although no livery and seisin be made; so is a covenant to stand seized to bargainee's use. A previous entry on the land is not necessary to enable the plaintiff to support his action: the action of ejectment may be maintained, if the plaintiff has a right to enter.

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“ fend the said *William Rugge*, his heirs and assigns for ever,  
 “ of, in, and to the said tracts of land, from and against the  
 “ claim or claims of all persons whomsoever, claiming, or to  
 “ claim, by, from or under him, his heirs or assigns.” This  
 deed was duly executed, proved and recorded. Underneath  
 was the following note: “ It is also agreed, by and between  
 “ the parties to these presents, that the said *Richard Ellis* is  
 “ to have, hold, occupy, and enjoy peaceable and quiet pos-  
 “ session, of all and singular the aforesaid premises, from  
 “ the day of the date hereof unto the first of *January*  
 “ next ; he, the said *Richard Ellis*, in consideration there-  
 “ of, paying 1s. sterling, when demanded, and then to deli-  
 “ ver quiet possession thereof, unto the said *William Rugge*,  
 “ his heirs and assigns ; in testimony whereof, I have here-  
 “ unto set my hand and seal, this 10th of *August*, 1785.

(Signed) RICHARD ELLIS.”

*Read* opened the cause, by producing the *deed*, which was admitted ; read it, and rested the case ; the *locus in quo* being also admitted.

*Pinckney* then moved, that the plaintiff be nonsuited, upon the ground, that the evidence offered was insufficient to maintain the action, and said if the plaintiff refused, he should be denied the privilege hereafter, but must submit to the verdict of a jury. He took two grounds ; 1st. That this deed is not sufficient to convey the lands ; 2d. If it were, this action could not be maintained without evidence of a *previous actual* entry, by the plaintiff, on the lands.

*Read*, *Pringle*, and *Ford*, in support of the action, argued, that from the face of this deed, it was the evident intention of the parties, that the lands should pass ; therefore, the court will effectuate that intention, and not let the defendant deny, what appears under his own seal. This is no freehold commencing *in future*. The grantor *attorned* as tenant, and acknowledged by indorsement on the deed, he was to hold and pay rent : this was a *constructive* livery, and was tantamount to the indorsement and livery upon the deed ; that this deed agrees with a bargain and sale, or

may be construed a covenant to stand seised to uses; that entry on lands is done away by the act of assembly, 1712, which declares an action at law to be the only legal method of claiming lands.

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*Pinckney* and *Rutledge* replied, and insisted, that the doctrine of *attornment* never applies between *grantor* and *grantee*, but only between *landlord* and *tenant*. As to bargain and sale, it cannot be construed either into a bargain or sale, or covenant to stand seised. The latter cannot be supported except by consideration of blood. As to entry, the clause in the act of limitation only intended to take away the necessity of *continual claim* at common law. That from a view of the deed, the parties did not intend this memorandum or agreement to be definitive, but a further conveyance was contemplated. The plaintiff ought not to recover, as has already been decided in a court of equity, where the court, seeing this deed was never intended to be the ultimate conveyance, refused a specific performance.

WATIES, J. There are three questions which arise in this case: 1st. Whether there is any other mode of conveying lands in this state, besides by *lease* and *release*. 2d. Whether the plaintiff's deed can take effect either as a *feoffment*, a bargain and sale, or a covenant to stand seised to uses. 3d. Whether the plaintiff can maintain this action of ejectment without entry. There is no doubt but that there may be different modes of conveying lands. The question depends upon *positive* law, and that law *modern*. The true intention of the different forms of conveyance is to ascertain the real proprietor of the land, and to make him notorious. This was the object of the *statute of uses*, which object is effected by extirpating the estate of the feoffee to uses. It was not the intention of the legislature of this country to restore the old investiture, nor to provide against secret uses; but they adopted this statute to give facility to every mode of transferring lands. The act for recording

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conveyances passed long before, in the year 1698. As to the reasoning to shew that the legislature, in adopting the statute of uses, meant to exclude all other modes of conveyance under it, except the lease and release, it rests upon implication too slight to overturn the acknowledged operation of a positive statute. What advantage does the mode of lease and release possess over that by bargain and sale? It is longer, more tedious, and more expensive. It was adopted and brought over here by the practitioners in *England*, and in use before the statute of uses was made of force. But the statute, when made of force, warranted as well the bargain and sale, and covenant to stand seised, as the lease and release.

2. What shall be the effect of this deed; as a feoffment, a bargain and sale, or a covenant to stand seised. It would perhaps require much refinement to make it a good *feoffment*. Possession indeed, acquired in any way, might operate as good livery and seisin under it, and with the possession it would be a good title. But there is no need at all of a strained construction to make this a good deed. I consider it as a good bargain and sale. The consideration was in part executed, and is acknowledged on the face of the deed. The terms of it shew a plain intent to pass the estate. The deed, therefore, must stand, unless it can be impeached, through fraud or some such thing, before the jury.

3. But it has been contended that entry was necessary in order to maintain this action. It is necessary to inquire what kind of injury is complained of in this case. Judge *Blackstone*, in his *Commentaries*,\* enumerates five kinds of *ouster*, abatement, intrusion, disseisin, discontinuance, and deforcement. The injury in this case comes properly under the last: "Deforcement may also be grounded on the non-performance of a covenant real; as if a man seised of lands covenants to convey them to another, and neglects or re-

\* Vol. 3. p. 167.

“fuses so to do, but continues possession against him, this possession, being wrongful, is a deforcement.”\* It is laid down in the succeeding page, that “upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to his action.” This solves all difficulties on the subject, and takes away the necessity, and, indeed, the propriety of a previous entry in this case. If, however, it depended upon the principles of this action of ejectment, the result would be the same, where the plaintiff’s lessor has a right of entry. The action is competent where the lessor of the plaintiff *may* enter. The question is not whether he *has* entered, but whether he *may* enter. This action has been allowed in this country, even where the right of entry has been tolled by descent cast. It ought to be so—the rigid forms of ancient real actions have long since been mouldering away, and giving place to others, more liberal and better calculated to answer the ends of justice.

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The motion for the nonsuit was overruled, and on the case going to the jury, they returned a

*Verdict* for the plaintiff.

By an act of the legislature, since the determination of this case, a bargain and sale is declared to be a good deed to pass a fee in all cases, without livery and seisin.

\* Vol. 3. p. 174

August 30,  
1790.

M'TEER *against* the Executors of FERGUSON.

Where a legatee accepts of a bond from the executor for the amount of his legacy, it extinguishes the legacy, and creates a new debt; and, if given before 1787, it comes under the instalment law. Notwithstanding, the amount in the hands of executor, if no such bond had been accepted, might have been money had and received in his hands for legatee's use.

THIS was an action of debt on bond. The bond was entered into in the life-time of testator, previous to the 1st of *January*, 1787, and came under the instalment act, which makes all debts previous to that day payable by five equal annual instalments.

*Read* offered evidence to shew that this bond was given for a legacy due to the plaintiff, which was in the hands of testator, as executor of the estate from which it is payable. That it therefore came under the denomination of money had and received by the testator to the plaintiff's use, which was one of the exceptions in that act, and insisted that this debt was not liable to be paid by instalments.

*Pinckney*, for defendants, cited *Buller*, 182. "That a bond given to a legatee extinguishes the legacy." From whence he argued, that the bond created a new debt, in which not the estate, but the executor, in his private capacity, was the debtor; and that from this change of the nature of the debt, all relation with the legacy was determined.

WATIES, J. charged the jury, that this bond clearly created a new debt, which the legatee thought proper to accept of, in lieu of the bequest mentioned in testator's will, and as it was previous to the 1st of *January*, 1787, it came under the instalment act, and was no otherwise recoverable than as that act directs; and the jury found accordingly.

BRISBANE *against* LESTARJETTE.

August 30,  
1790.

CASE on a note of hand, given by defendant, and indorsed to plaintiff.

The defendant admitted the note, but gave evidence that it was given when the *British* army were in *Charleston*, and when the parties were within their power and jurisdiction. That the defendant was arrested by process from the *British board of police*, and being unable to pay the sheriff's fees, he gave this note for the amount of those fees. That the plaintiff indorsee was present at the time, and knew the consideration of the note to be such. The plaintiff did not shew that he had paid any person *valuable* consideration for the note.

The indorsee cannot recover on a note given for an illegal consideration, if he appears to have known of it; or if he cannot shew that he gave a valuable consideration for it.

*Fraser*, for the defendant, insisted, that the note was given on an *illegal* consideration, the *British* board of police having been repeatedly adjudged in this court an illegal body, and all acts done under their authority void. The plaintiff was present, and knew the illegal and oppressive circumstances under which the note was obtained. He cannot be considered as an innocent indorsee, when he took it with his eyes open.

*Pinckney*, contra, contended, that it was a plain negotiable note, which appears to have been regularly indorsed, and is good under the statute. That however improperly the police, its officers, or suitors might have acted, the plaintiff had no agency in the business. He took it on the footing of its negotiability.

WATIES, J. When a note appears to have been given for an illegal consideration, the indorsee cannot recover if he appears to have known it; nor unless he prove that he gave valuable consideration for it.

*Verdict* for defendant.

August 30,  
1790.

COLCOCK and GIBBONS *against* WAINWRIGHT.

A depreciation, fixed by arbitrators before the depreciation act, shall bind the parties; though the plaintiffs may have been obliged to pay considerably more than that act would have compelled them to have paid.

THE plaintiffs had been indebted to the defendant, in a bond given (as it appeared) for the purchase of a house, in the time of depreciated money, and while the *British* were in possession of *Charleston*. The defendant threatening to sue them, the plaintiffs, to avoid, as they alleged, an unpleasant contest, agreed to pay the debt, on its being liquidated, with such depreciation as arbitrators should fix. At that time, no depreciation table was established. The debt was depreciated by the arbitrators, and the money paid. Afterwards, when the *legal* depreciation table was established by the legislature, it appeared that the plaintiffs had paid much more than that table would have fixed the bond at. The plaintiffs commenced this action (for money had and received) to recover back the surplus.

The defendant proved that the house was worth the sum fixed by the arbitrators, and contended that no injustice was done. That the plaintiffs were bound by their subsequent acquiescence to the arbitration,

WATIES, J. Even if a settlement were made by parties at this day, though different from the depreciation table, it would bind them. This is a liberal action, and the jury can do what appears to them to be equitable and conscientious. There are two questions. 1. Whether the depreciation table *does* apply; and I think it does not in this case. 2. Whether this was a fair and voluntary settlement; I think it was. The house appears to have been worth then, as well as now, the sum fixed by the arbitrators. Nothing appears to impeach the transaction.

*Verdict* for defendant.

See the case of *McGraw and wife v. Lowndes*, vol. 2.



1790.

PETRIE, survivor of HAWKINS, *against* SMITH.

THIS was an action of debt on an old bond, dated in 1775, and payable in 1776. To this there was a plea of tender of the bills of credit, circulating in the year 1780; and under this plea evidence was given of a tender made by *James Edwards*, on the 27th *January*, 1780, to the attorney or agent of the plaintiff; and the identical bills were brought into court and sworn to.

Tender in paper currency, in *January*, 1780, before it went out of circulation, is good, and shall stop interest from the time of such tender.

*Pinckney*, for defendant, contended, that if this tender did not go to the discharge of the debt, yet it should discharge the interest on it, from the day the tender was made, till the time of suing the writ. To prove the money was a tender, he cited a resolve of the provincial congress in 1776.

For plaintiff, it was said, that the jury should avoid the tender, as it was made in a currency worth nothing, and to an attorney. That the difference between sterling money at the time of the contract, and the present sterling money (being 3 4-7 *per cent.*) ought to be allowed.

For defendant, it was insisted, that tender to an attorney is good under an act of assembly.

WATIES, J. charged, that the tender was good. That the clause of the resolve of the provincial congress applied to this money. As to the 3 4-7 *per cent.* it is the difference made by the legislature between the coin in the *then* currency and now. The law is clear, and the jury have no discretion in the case, and this is equally the case, although no tender of money had been made.

The *Jury* stopped the interest from the tender to the date of writ, turned the debt into present currency, by advancing upon it 3 4-7 *per cent.* and returned a

*Verdict* for plaintiff.

September 1,  
1790.

LANE, SON & FRASER, *against* WINTHROP,  
TODD & WINTHROP.

*A.* makes an agreement to deliver rice to *B.* or his assigns; *B.* afterwards, by an indorsement on the back of such agreement, directs the rice to be delivered to *C.* which is accepted of and signed by *A.* This shall create a new contract between *A.* and *C.* so as to preclude any discount or equity being gone into, between *A.* and *B.* the original contracting parties.

THIS was an action on the case, brought on the following note against the defendants, as copartners, upon their acceptance. The note was "For value received, *Boston*,  
" 21st October, 1785, I promise, in behalf of *Winthrop, Todd*  
" & *Winthrop*, merchants of *Charleston, South-Carolina*,  
" to ship on account of *Nathaniel Tracey, Esq.* or his as-  
" signs, a thousand tierces of rice, in all the month of *De-*  
" *cember*, or so soon as the new rice comes to market, in  
" any vessel or vessels he or they may direct; the same to  
" be addressed to Messrs. *Lane, Son & Fraser*, in *Lon-*  
" *don*.

(Signed)

" THOS. L. WINTHROP."

(Indorsed thus)

" Deliver the within mentioned rice to Messrs. *Lane*,  
" *Son & Fraser*, or order.

" NATH. TRACEY."

And accepted thus. " Accepted to deliver the within as  
" above, in behalf of *Winthrop, Todd & Winthrop*.

" THOS. L. WINTHROP."

This last acceptance was made *after* the indorsement by *Tracey*. The declaration stated the circumstances; and the above note, with its indorsement and acceptance, was given in evidence to support it.

*Rutledge and Pringle*, for the plaintiffs.

*Pinckney and Bay*, for the defendants.

*Bay* objected to this note and indorsement being given in evidence, in favour of the plaintiffs, as he said they could not maintain any action thereon. He moreover stated, that the defendants had a discount against *Tracey*, to the whole value of the rice, which they would be precluded from re-

covering, (as *Tracey* had lately failed,) unless they were permitted to offer it in discount against this demand. He then urged that this was not such a negotiable paper, as would enable the plaintiffs to maintain an action, in their own right ; because it is not for payment of money. It is not under the statute which makes promissory notes negotiable. It depends on common law assignment.

*Pringle*, for plaintiffs, did not proceed on an implied *assumpsit*, by virtue of the assignment ; but on the *express undertaking of the defendants* in writing, upon the back of the note, after the assignment was made. For it was after the assignment to the plaintiffs, that the defendants wrote on the back of the paper, that they would *deliver* the rice to the plaintiffs, agreeably to the indorsed order. The action does not depend upon the *supposed* negotiability of the paper, which might raise an implied *assumpsit* in law ; but on the express *assumpsit* made by the defendants themselves.

*Bay* replied, and said the question then was, whether the acceptance on the back at all altered the case ? He contended, that a note or debt, not negotiable, cannot be made so by consent of parties, and cited to this effect, a case from *Vin. Abr.* (tit. *Assignment*,) that they had not shewn any consideration moving from themselves. The indorsement does not express for value received.

*Rutledge*, for plaintiffs. The court, in commercial questions, look for the intentions of parties. It is here evident that *Tracey* meant to assign over the absolute property in this rice to *Lane, Son & Fraser* ; and that *Winthrop, Todd & Winthrop* so accepted it, to *Lane, Son & Fraser* ; or why order the defendants to *deliver* it ? Why was the *second* engagement entered into, if such was not the intention ? A second acceptance is a new undertaking. The tenor of the *first* engagement to deliver to *Tracey*, “ or his assigns,” is pursued, and afterward accepted of. This is not a *nudum pactum*. No contract in writing is such.

*Pinckney* said, that this was a *nudum pactum*. That the plaintiffs are the agents of Mr. *Tracey*. There is no con-

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sideration expressed ; which would have been the case, if it had been the intention of the parties to create a new contract. *Tracey* could assign no more than *his interest*, subject to all the original equity of the other party, which equity they are precluded from, by the nature of the action, in the name of the plaintiffs.

WATIES, J. *overruled the exception.* The question is, whether the right on which this action is brought, is an *assigned* right, or an *original* right. If the former, this action cannot be maintained. If the latter, it is regularly brought ; for, in such a case, it is a *new* contract ; and I think the latter is evident from the transaction. The only case which contradicts it, is one cited from *Viner* ; which, in my opinion, is neither good law or good sense. A man may surely make what contract he pleases ; and the defendants agreed to waive their equity (if any they had) in the original, by entering into a new contract. This they surely had a right to do, and must now be bound by it. The case of *Bay* and *Frazer* is very strong. It did not decide between the *obligor* and obligee, but between the *assignor* and assignee. This, therefore, being an *original* right, and not an assigned one, no equity between the original parties can be set up against the present plaintiffs' claim.

The jury found for the plaintiffs.

SPENCE *against* SANDERS.September 2,  
1790.

IN this case, an interlocutory order for judgment was obtained against the defendant. The action was brought upon a book account, for professional services. Upon executing the writ of inquiry,

Proof of the original book of entries, and that they were made in the hand-writing of the plaintiff, (who is out of the country,) is good evidence to go to a jury upon a writ of inquiry.

*Pinckney* and Mr. *John Drayton*, stated to the court the nature of the evidence they intended to offer, in order to prove the account. The plaintiff, they said, had long practised in *South-Carolina* as a physician; but at the time of confiscation, his estate was confiscated. His books of account were not. Before he quitted the country, he made oath before one of the judges, (Mr. Justice *Pendleton*,) to his original entries. That the several charges therein were for professional services, entered in his book by himself, and were in his own hand-writing; and this book contained the original entries. This book he left in *Carolina*. His hand-writing in the book was sworn to. They submitted to the court, that this was proper evidence, under the circumstances aforesaid, to go to the jury, *upon a writ of inquiry*, upon the ground of its being the best evidence the nature of the case admits. They granted it was *ex parte*; but all evidence on writs of inquiry must necessarily be so, judgment having gone against the defendant by default. It appeared by the book, that the defendant had paid part of the account.

*WATIES, J.* requested the jury to find the debt, according to the entry in that book, and to reserve the question of law for the court, and he would take time to consider of it.

*Afterwards*, he gave his opinion, that the evidence, under the special circumstances as stated, was good; and the plaintiff took his judgment.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURTS OF COMMON PLEAS**  
**AND**  
**GENERAL SESSIONS OF THE PEACE, &c.**  
**IN THE YEAR 1791.**

*February Sessions, 1791.*

**The STATE against WASHINGTON.\***

Although the forging of a general indent of this state, is not made a capital offence, by the act of assembly which authorises the issuing of the same; yet the forging a receipt on the back of such indent, for the accruing annual interest, which appears to be payable from the face of it, with an intent to give the said in-

**FORGERY.** The indictment in this case was as follows: "The jurors of and for the district of *Charleston* aforesaid, in the state aforesaid, on their oath, present, that *John Edwards*, of the city of *Charleston* aforesaid, Esquire, some time past was, by the legislature of the state aforesaid, appointed to, and for some time thereafter, and before the day of taking this inquisition, acted in, the office and appointment of a commissioner of the treasury of the state aforesaid, and in the said office was, by the

\* The report of this case was taken by a gentleman of the bar at the time of the trial, who very obligingly favoured me with it for publication; to whom, on the present, as well as many other similar occasions, I am under great obligations.

dent currency, and uttering the same in order to defraud, is felony without the benefit of clergy, under the statute of *Geo. II. c. 25.* made of force in this state.

An indictment, stating an offence against the state, and concluding with the words "against the peace and dignity of the same," is not faulty, but good within the terms of the new constitution of 1790.

“ legislature of the said state, entrusted with and authori-  
 “ sed, as a commissioner of the treasury, in the power of  
 “ signing and issuing indented certificates from the said  
 “ treasury ; whereby the public treasury of the said state of  
 “ *South-Carolina*, is made liable, and the faith of the said  
 “ state of *South-Carolina* pledged, by said indented certifi-  
 “ cates, for the payment of the sums of money stipulated to  
 “ be paid in such indented certificates ; and to receive the  
 “ same in payment for purchases of confiscated property at  
 “ the said treasury. And the jurors aforesaid, upon their  
 “ oaths aforesaid, do further present, that *Thomas Wal-*  
 “ *singham*, otherwise called *Thomas Welsh*, otherwise called  
 “ *Thomas Wells*, otherwise called *Thomas Washington*, late  
 “ of the state of *Georgia*, but now of the city of *Charles-*  
 “ *ton*, in the district of *Charleston*, and state of *South-*  
 “ *Carolina*, on the 18th day of *January*, in the year of our  
 “ Lord, 1791, with force and arms, at the city of *Charles-*  
 “ *ton*, in the district of *Charleston*, and state of *South-*  
 “ *Carolina* aforesaid, feloniously did falsely make, forge  
 “ and counterfeit, and also feloniously did cause and pro-  
 “ cure to be falsely made, forged and counterfeited ; and  
 “ feloniously also did willingly act and assist in the false  
 “ making, forging and counterfeiting, a certain writing obli-  
 “ gatory, written and filled up by hand-writing, in a certain  
 “ partly printed paper, called a blank *indented certificate* ;  
 “ and thereby purporting the same, by such writing and  
 “ such filling up, in the said partly printed paper, called a  
 “ blank indented certificate aforesaid, with the printed part  
 “ thereof together, to be an indented certificate, commonly  
 “ called a *general indent* of the said state of *South-Carolina*,  
 “ and as filled up in hand-writing, at the treasury of the said  
 “ state of *South-Carolina*, to wit, at the city of *Charleston*,  
 “ in the district of *Charleston*, and state of *South-Caro-*  
 “ *lina* aforesaid ; and to be issued and signed by the said  
 “ *John Edwards*, by the name of *John Edwards*, as a com-  
 “ missioner of the treasury of the said state, pursuant to  
 “ an act of the general assembly of the said state, passed

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“ the 16th day of *March*, in the year of our Lord, 1783,  
 “ and thereby obliging the said commissioners of the said  
 “ treasury, on behalf of the said state of *South-Carolina*,  
 “ to pay at the said treasury, to one *Thomas Reynolds*, his  
 “ executors, administrators, or assigns, the sum of 86/  
 “ 2s. 4d. on demand, for one year’s interest on the principal  
 “ sum of 1,230/. 5s. 8d. sterling, in part of the said writing  
 “ obligatory, and the like interest annually, by resolution of  
 “ the general assembly, and the principal sum of 1,230/. 5s.  
 “ 8d. sterling on the 12th day of *April*, 1787 ; or to re-  
 “ ceive the said writing obligatory, written and filled up in  
 “ writing, as a writing obligatory as aforesaid, in the afore-  
 “ said partly printed paper, called a blank indented certifi-  
 “ cate, and thereby purporting the same by such writing,  
 “ filled up and written in the said partly printed paper, to-  
 “ gether with the printed part thereof, and signed as afore-  
 “ said, to be an indented certificate, commonly called a ge-  
 “ neral indent, in payment for any purchases, he, the said  
 “ *Thomas Reynolds*, his executors, administrators or as-  
 “ signs, may make, at any public sales of confiscated pro-  
 “ perty; (except such as should be ordered by the legislature  
 “ for special purposes ;) which last mentioned false, forged,  
 “ and counterfeit writing obligatory, written and filled up  
 “ in writing, as a writing obligatory as aforesaid, in the  
 “ aforesaid partly printed paper, called a blank indented  
 “ certificate, and thereby purporting the same, by such  
 “ writing filled up and written, in the said partly printed  
 “ paper, together with the printed part thereof, and signed  
 “ as aforesaid, to be an indented certificate, commonly call-  
 “ ed a general indent of the said state of *South-Carolina*  
 “ aforesaid, is in the words, figures, and cyphers following,  
 “ to wit, ‘ *South-Carolina*. Pursuant to an act of the ge-  
 “ neral assembly, passed the 16th of *March*, 1783, we, the  
 “ commissioners of the treasury, have this day delivered to  
 “ *Thomas Reynolds*, this our indented certificate, for the sum  
 “ of 1,230/. 5s. 8d. sterling, for cattle, corn, and militia  
 “ duty, in 1781, as per account audited. The said *Thomas*



“ *Reynolds*, his executors, administrators or assigns, will  
 “ be entitled to receive from this office, the sum of 86*l.* 2*s.*  
 “ 4*d.* on demand, for one year’s interest, on the principal  
 “ sum of 1,230*l.* 5*s.* 8*d.* and the like interest annually, per  
 “ resolution of the general assembly. The said *Thomas*  
 “ *Reynolds*, his executors, administrators or assigns, will  
 “ be entitled also to receive, and shall be paid, if demand-  
 “ ed, the principal sum of 1,230*l.* 5*s.* 8*d.* sterling, on the  
 “ 12th day of *April*, 1787 ; and the said *Thomas Reynolds*,  
 “ his executors, administrators or assigns, may make any  
 “ purchases, at any public sales of confiscated property, (ex-  
 “ cept such as shall be ordered by the legislature for special  
 “ purposes,) and this indent shall be received in payment.  
 “ For the true performance of the several payments in man-  
 “ ner above mentioned, the public treasury is made liable,  
 “ and the faith of the said state pledged by the aforesaid act.  
 “ Given under our hands and seals, at the treasury office in  
 “ *Charleston*, the 12th day of *April*, 1785. *John Edwards*,  
 “ commissioners of the treasury. 1,230*l.* 5*s.* 8*d.* principal.  
 “ 86*l.* 2*s.* 4*d.* annual interest. No. 1587. Exd. Book Y.  
 “ E. A.’ which said last mentioned writing obligatory, writ-  
 “ ten and filled up in writing, as a writing obligatory afore-  
 “ said, in the aforesaid partly printed paper, called a blank  
 “ indented certificate, together with the printed part of such  
 “ paper, and signed as aforesaid, and thereby purporting  
 “ to be an indented certificate, commonly called a general  
 “ indent, in the said words, figures and cyphers, then did,  
 “ and still doth import and signify, that the said commis-  
 “ sioners of the treasury, on behalf of the said state of *South-*  
 “ *Carolina*, then were, and still are liable, to pay the inte-  
 “ rest money, to wit, 86*l.* 2*s.* 4*d.* annually, and the said  
 “ principal sum of 1,230*l.* 5*s.* 8*d.* sterling, to the said *Tho-*  
 “ *mas Reynolds*, his executors, administrators or assigns,  
 “ or to receive the said last mentioned writing obligatory,  
 “ written and filled up as a writing obligatory aforesaid, in  
 “ the aforesaid partly printed paper, called a blank indented  
 “ certificate, together with the printed part of such paper,

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“ and signed as aforesaid, and thereby purporting to be an  
 “ indented certificate, commonly called a general indent,  
 “ in payment of any purchases he, the said *Thomas Reynolds*, his executors, administrators or assigns, may  
 “ make, at any sales of confiscated property ; (except such  
 “ as shall be ordered by the legislature for special purposes ;)  
 “ and which said writing obligatory, written and filled up in  
 “ writing as a writing obligatory, in the aforesaid partly  
 “ printed paper, called a blank indented certificate, together  
 “ with the printed part of such paper, and signed as aforesaid, and thereby purporting, in the whole, to be an indented certificate as aforesaid, he, the said *Thomas Walsingham*, otherwise, &c. &c. &c. then and there did feloniously and falsely make, forge and counterfeit ; and did  
 “ also cause and procure to be falsely made, forged and counterfeited ; and also did willingly act and assist in the false making, forging and counterfeiting the same, with an intention to defraud the said *John Edwards*, and the commissioners of the treasury of the state aforesaid, and the said state of *South-Carolina*, against the form of the act of the general assembly of force in the state of *South-Carolina*, and in such case made and provided, and against the peace and dignity of the same state.”

The second count charges, “ That the said *Thomas Walsingham*, otherwise, &c. &c. &c. afterwards, to wit, on the 18th day of *January*, 1791, with force and arms, &c. feloniously did utter, and publish as true, a certain false, forged, and counterfeited writing obligatory, written and filled up as a writing obligatory, in a certain printed paper, called a blank indented certificate, together with the printed part of such paper, and thereby, in the whole, purporting to be an indented certificate, commonly called a general indent of the said state of *South-Carolina*, and to be issued and signed by the aforesaid *John Edwards*, formerly one of the commissioners of the said treasury of the state of *South-Carolina*, by the name of *John Edwards*, as a commissioner of the trea-

“ sury, and entrusted by the said state, for issuing indent-  
 “ ed certificates of the said state from the treasury, where-  
 “ by the said treasury is made liable, and the public faith is  
 “ pledged, for payment of the sums stipulated to be paid  
 “ in such certificates, and as one of the said commission-  
 “ ers, and pursuant to an act of the general assembly of the  
 “ said state, passed the 16th day of *March*, 1783 ; which  
 “ said last mentioned false, forged, and counterfeit writing  
 “ obligatory, written and filled up, &c. is in the words,  
 “ figures, and cyphers following, to wit, (here the *indent* in-  
 “ serted *verbatim* as before,) which said false, forged, and  
 “ counterfeit, &c. the said *Thomas Walsingham*, otherwise,  
 “ &c. &c. &c. did utter and publish as true, with an inten-  
 “ tion to defraud one *John David Vale*, of the city of *Charles-*  
 “ *ton* aforesaid, merchant ; he, the said *Thomas Walsing-*  
 “ *ham*, otherwise, &c. &c. &c. at the time of uttering and  
 “ publishing, &c. &c. then and there well knowing the same  
 “ to be false, forged, and counterfeited, against the form  
 “ of the act,” &c. (*concluding as before.*)

The *third* count was in these words : “ And the jurors  
 “ aforesaid, upon their oaths aforesaid, do further present,  
 “ that the said *Thomas Walsingham*, otherwise, &c. &c. &c.  
 “ on the 18th day of *January*, 1791, with force and arms,  
 “ at, &c. &c. feloniously did falsely make, forge, and coun-  
 “ terfeit ; and feloniously did falsely procure to be made,  
 “ forged, and counterfeited ; and feloniously did willingly  
 “ act and assist, in the false making, forging, and counter-  
 “ feiting, *a certain acquittance and receipt for money*, on a  
 “ certain paper, purporting to be an obligation, called an  
 “ indent, for payment of money, and for the sum of 172*l.*  
 “ 4*s.* 8*d.* and as signed by one *Thomas Reynolds*, being dou-  
 “ ble the amount of 86*l.* 2*s.* 4*d.* and subscribed with the  
 “ name of *Thomas Reynolds* ; which said false, forged, and  
 “ counterfeit acquittance, and receipt for money, in writing,  
 “ on the paper aforesaid, is in the words and figures following,  
 “ to wit, ‘ Received 14th *October*, 1785, two years interest on  
 86*l.* 2*s.* 4*d.*

“ the within indent. *Thomas Reynolds.* 86*l.* 2*s.* 4*d.*”

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“ With an intention to defraud the said Thomas Reynolds,  
“ against the form,” &c. (concluding as before.)

The *fourth* count was, “ For uttering as true, the said  
“ last mentioned false, forged, and counterfeited acquittance  
“ and receipt for money, with an intention to defraud the  
“ said John David Vale, well knowing, &c. &c. against the  
“ form,” &c. (concluding as before.)

The *fifth* count was like the third, only setting forth another false, forged, and counterfeited receipt for money, in these words : “ Received 8th February, 1788, two years’ interest.

86l. 2s. 4d.

“ Benjamin Lee. 86l. 2s. 4d.” With an intention to defraud the said Benjamin Lee, (concluding as before.)

The *sixth* count was like the fourth, only charging, that he uttered, &c. the false, &c. acquittance and receipt mentioned in the last count, with an intention to defraud the said John David Vale, (concluding as before.)

The *seventh* count was like the third and fifth, only setting forth another false, &c. acquittance and receipt, in these words : “ Received 6th August, 1789, two years’ interest to

86l. 2s. 4d.

“ 1st April last. John Hill. 86l. 2s. 4d.” With an intention to defraud the said John Hill, (concluding as before.)

The *eighth* count was like the fourth and sixth, only charging, that he uttered, &c. the false, &c. acquittance and receipt mentioned in the last count, with an intention to defraud the said John David Vale, (concluding as before.)

The *ninth* count was like the second, only that it charged the uttering and publishing the aforesaid false, forged, and counterfeited writing obligatory, with an intention to defraud the aforesaid John Edwards, and the commissioners of the treasury aforesaid, (concluding as before.)

The *tenth* count was for uttering as true, the acquittance and receipt mentioned in the third count, with intention to defraud the said Thomas Reynolds, (concluding as before.)

The *eleventh* was a similar count, upon the acquittance and receipt set forth in the fifth count, with intention to defraud the said *Benjamin Lee*, (*concluding as before.*)

The *twelfth*, and last count, was like the two last, only upon the acquittance and receipt set forth in the seventh count, with intention to defraud the said *John Hill*, (*concluding as before.*)

To the foregoing indictment the prisoner pleaded *not guilty*, and put himself upon his country, &c.

After a deliberate, lengthy, and impartial trial, the jury brought in their verdict, "*guilty.*"

*Holmes* then gave notice to the attorney-general, that he intended to move in arrest of judgment.

And now, on *Wednesday*, the 9th of *March*, 1791, the prisoner was brought again to the bar ; (present, his honour the Chief Justice, Mr. Justice *Grimke*, and Mr. Justice *Bay*;) and being asked, in the common form, what he had to offer why judgment should not be passed against him,

*Holmes* rose, and stated the following grounds, in arrest of judgment, viz.

1. That the indictment is faulty, and defective. 1. Because it concludes "against the peace and dignity of the same state ;" the word "*state*" being wrongly added, and not in the constitution.\* 2. Because it charges, that "*John Edwards, late treasurer,*" &c. instead of "*John Edwards, treasurer at the time the indent was issued.*"

2. That the indent issued by *one treasurer*, was not legally issued, nor such an indent as the law prescribed to be issued ; and is so far illegal that no criminal prosecution can be grounded upon it.

3. That the writing, which was forged, was not a *writing obligatory*, as charged in the indictment ; not such an one as comes within the act.†

\* The words of the constitution are, "all prosecutions shall be carried on in the name, and by the authority, of the state of *South-Carolina*, and conclude, *against the peace and dignity of the same.*" Art. 3. s. 2.

† An act of assembly, passed 5th *March*, 1736, the 3d section, copied verbatim from 2 Geo. II. c. 25. except a few words, which are copied verbatim from 7 Geo. II. c. 22.

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N. B. The  
Chief Justice  
*Rutledge*, and  
Mr. Justice  
*Bay*, took  
their seats on  
the bench this  
day, for the  
first time after  
their appoint-  
ment.

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4. That the acquittances and receipts, charged in the indictment, are none of them such as come within the act.\*

Upon these grounds he moved, in behalf of the prisoner, that the judgment be arrested.

*Lowndes*, for the prisoner. We cannot now deny the guilt of the prisoner at the bar, he having been found guilty by a jury ; we can only contend that his guilt is not comprehended within the act under which he has been indicted. In cases like this, where life is concerned, the court will be exceedingly cautious of enlarging or extending by construction. No regard will be had to the turpitude of the guilty, provided it is not a capital crime ; for it is to be remembered, that the law is to act upon *offences*, and not upon offenders. Though the laws of *Sylla* and *Cæsar* were of the latter kind, and have properly been said to have been written in characters of blood, they were made to answer the purposes of tyranny and ambition, and can form no proper precedent in a free country, which boasts of its citizens being liable to no punishment which is not, together with the crime, properly and legally defined.

The indictment suggests the following heads, under which I shall arrange my arguments. It charges the prisoner in a two-fold form : 1. For counterfeiting the indent ; and, 2. For counterfeiting the receipts. It is a general rule, and a good one, that where a statute uses an expression known at common law, it shall be taken in the same sense it was known to have at the common law. The clause of the statute, under which this indictment is framed, uses the words “ writing obligatory ;” and these words are chosen, on the present occasion, to signify an indent which is not under seal. In 3 *Bac. Abr.* 690. this term is defined and explained. It is there laid down to be an instrument *under seal* ; a seal is held to be necessary in the formation of it.

\* The words are, “ any deed, will, testament, bond, *writing obligatory*, “ bill of exchange, or promissory note *for payment of money*, or any *acquittances or receipts*, either for money or goods, &c. *with intention to defraud* “ any person whatsoever ; or shall utter or publish as true, any,” &c. &c.

If this be the legal signification, the court will not resort to common acceptation in a case so highly penal. Had the legislature intended that the words "writing obligatory" should have been so comprehensive, why did they add the long list of other words in the same clause? They might all have been as well comprehended under the general terms. A bill of exchange is as much a writing obligatory as an indent, in this enlarged acceptation. He cited 4 *Black. Com.* 247. and 1 *Hawk. P. C.* 186. In the latter, the difference taken between statute merchant and statute staple, is, that the former is under the seal of the party, and the latter not; (having only the seal of the staple;) and, therefore, that the former is within the statute, "as being *obligations*," but the latter is not. Why was it deemed necessary, by the legislature, to pass acts making it felony to counterfeit the state money? They are bills of credit—they are writings obligatory as much as indents—they are receivable at the treasury, yet the legislature must have thought that, otherwise it would not be felony to counterfeit them. So, also, they were obliged to pass a law to make it felony to counterfeit the existing certificates of the state, in the year 1776. (*Pub. Laws*, 283.) This shews that there had been an omission in the laws before, yet the present statute was then in force. The number of acts lately passed in *England*, providing against the counterfeiting of particular papers, shew, that the parliament did not think the statute of 2 *Geo. II.* (from which ours is copied,) would comprehend them; and, yet, many of those were as much writings obligatory as our indents. Thus, in the opinion of our own legislature, and of the parliament of *Great Britain*, those words are not so comprehensive as *Mr. Attorney-General* would contend. The statute of *Edw. VI.* against stealing *horses*, was held not to extend to him who stole a *horse*. So the stat. of *George*, about stealing *cattle*, was obliged to be amended afterwards. 1 *Black. Com.* 88. This shews how cautious the law is, not to enlarge, by construction, the meaning of an act which is so highly penal.

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2. The next subject of the indictment is the receipts indorsed upon the indent. These are said to be counterfeited with intention to defraud several. But whom can they defraud? Not the public; because they went to *discharge* and not to *charge* them. Say, then, it was the party who held the indent; but it came into his hands with the receipts upon it. The law intended such a fraud as went to divest some person of an existing right. If it be said that it was a fraud because it gave a specious fairness to the indent itself; I reply, that if the indent be no forgery *within* the act, the receipts cannot be so. For, considered apart from the indent, they are but an idle, unmeaning shred of paper. If considered conjunctively, it would be to derive a crime from a principal matter which is no crime in itself; a method which, in a capital case, can never be admitted. Wherever any receipt or acquittance has been adjudged to be within the statute, it has uniformly been where such receipt could stand alone, and work its mischief by itself; according to the cases in 1 *Hale*, *P. C.* 683. "If *A.* make a deed," &c. and *ibid.* 685. "If *A.* writes a letter," &c. Upon the whole, therefore, as the indent is no writing obligatory, criminal as it may be to forge it, such forging cannot be felony under this act; and, as the receipts, considered in themselves, (and they must be so considered,) have no meaning, and, of course, can effect a fraud upon no one, the judgment upon this indictment must lie arrested.

*Hall*, for the prisoner, laid down the following grounds: First, that this is no indent in law. Secondly, that it is no writing obligatory. Thirdly, that the acquittances and receipts are not such as come within the act. And, fourthly, that the indictment is faulty in its conclusion.

1. The act of assembly, which prescribes that indents shall be issued, (*Pub. Laws*, 322.) says, the *commissioners* shall give a treasury indent. The indent in question was signed by *one treasurer* only. As the act against forgery is highly penal, it ought not to be extended by construction. It is a rule in law, that all delegated powers must be pursued *strictly*. Many cases to this point. 8 *Mod.* 304. If



process be directed to the *sheriffs* of *London*, and one dies, the process is gone. Same doctrine in *Cowp.* 26. *Rex v. Croke*. It will be asked, are all the indents of the state, therefore, void, because one commissioner only has signed them? Admit they were so; the life of the prisoner is *paramount* to that consideration. But it is quite unnecessary, now, to decide the question in a civil view. It may be said, too, that this forgery is as dangerous, and destructive, as if it were a regular indent. No matter for that. The act is express. Penal statutes are to be construed strictly. 1 *Black. Com.* 88. Counterfeiting the great seal is felony; yet, to take it off from one patent and affix it to another, purporting to be a grant of the king, is no counterfeiting. 3 *P. Wms.* 431.

2. But even if it be ruled to a be good indent, still it is no *writing obligatory*. It requires a seal. 1 *Inst.* 172. *Jacob*, tit. *Obligor*, where the import of the word is laid down. If a writing obligatory could be without seal, why need the act to have enumerated a *promissory note*; it being equally a writing obligatory. It appears from 4 *Blac.* 249. that the stat. 2 *Geo.* II. c. 25. did not extend to him who forged an acceptance of a bill of exchange. It is very manifest, that the legislature, in 1737, could never have had indents in view; they were neither in existence, nor in contemplation. It has often been held, that new games which have been invented, are not within prior statutes. The legislature of *Great Britain* were obliged to pass a special act, making it felony to counterfeit *East-India* bonds, though they were writings obligatory. 4 *Blac. Com.* 248. If the legislature thought that the bills of credit, issued by the state, were writings obligatory, and within the act, why need they, in the year 1776, have passed an act making it felony to counterfeit them? The same may be said of the present paper medium.

3. This is not a receipt within the act. If the indent itself was not good, the receipt must fall with it. The receipt could not be intended to defraud any person; it could

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tend only to the disadvantage of him who made it. There is a case in *Leach's Crown Law*, p. 9. (*Russel's case*), where a man was indicted for forging an acquittance and receipt. It is a more regular receipt than the one on the back of this indent; yet he was acquitted, by reason of the *uncertainty* and vagueness of the receipt. But the receipt in the present case, was not a receipt *for money*, which the act requires: no money is ever appropriated by law, or paid for the interest upon general indents; it is paid by *special indents*, issued for the express purpose. But if bank bills have been adjudged not to be money, surely special indents are not money.

4. The indictment is faulty. Precision and certainty are always requisite, in order that a prisoner may know how to make his defence, and that he may not be liable to be brought twice into jeopardy for the same offence. The constitution has prescribed a form in which the indictment shall conclude; that form has been deviated from; and this vitiates the whole indictment. It also alleges, that *John Edwards*, "*late commissioner of the treasury*," issued it, instead of "*commissioner at the time the indent was issued*;" for he might lately have been treasurer, and yet not have been so, at *the time* of the issuing of that indent.

*Holmes*, for the prisoner. I shall proceed in this case according to the method first laid down. The first exception is, that the indictment is faulty in the conclusion, as it concludes "*against the peace and dignity of the same state*;" whereas the constitution prescribes that it should conclude "*against the peace and dignity of the same*." It may perhaps be said, and I will for the present admit, that in *England*, the word "*state*," would be rejected as surplusage. But still I contend, that had the form been prescribed by an *act of parliament*, they would not have rejected any word, as the deviation would have been fatal. *A fortiori*, when the form of an indictment is prescribed by our *constitution*, which is the highest authority,

the government knows the court must be bound implicitly to follow it.

Another objection is, that the indictment states the indent to have been made by *John Edwards*, "*late treasurer*," whereas it ought to have said, "treasurer at the time of issuing the indent." It may be alleged, that this is plainly obvious from the face of the indent; but no circumlocution, no latitude of intendment, ought to be admitted in a case like this. In the case of *Rex v. Knight, Salk. 375. Ld. Raym. 527. nuper receptor* was held not to mean king's receiver, *at the time* of the indorsement.

These grounds, however valid, are inferior to those which remain, and to which I shall now proceed; fully persuaded, that upon investigation, they will be found abundantly formidable, if not ultimately fatal to this indictment.

2. The indent issued by one treasurer was illegally issued, and was not such an indent as the law prescribed and required; and, of course, no criminal prosecution can be grounded upon it. The body of the indent purports to be issued under the act of the 16th of *March*; the indictment charges it so; and we are therefore precluded from saying any thing about the act of the 12th of *March*; no arguments are to be drawn from it. The act says, "the commissioners shall give a treasury indent," &c. It is impossible to understand this in any other sense than that "the commissioners shall sign," &c. The treasurers so understood it themselves; accordingly they framed the indent, beginning "We, the commissioners," &c. yet, with a strange inconsistency, only one commissioner signed the indent. The want of two commissioners signing the instrument, would have rendered it incomplete even in a civil suit; two persons cannot be jointly charged, where one only signs a bond or note, though it run in the name of both. It is true, the plaintiff might have had relief in equity; but this very circumstance would prove its inadequacy in a court of law. Shall it then be said, that in a criminal prosecution,

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for a capital offence, that it shall be sufficiently formal to take away life, when it could not have borne a civil suit? that less certainty, less formality, is requisite in a criminal, than in a civil procedure? The very reverse of this is the uniform and humane doctrine of the law. In the case of *Rex v. Moffatt, Leech*, 368. it is decided, upon mature deliberation, that *as the bill of exchange, if real, could not have been valid or negotiable, the forging of it was not a capital offence.* [Here Mr. Holmes took up, and answered at length, several cases cited by Mr. Attorney-General, at the trial, and which he supposed would again be cited on the present occasion, viz. *Ann Lewis's case, Foster*, 116. *Logan's case, Leech*, 389. and *John Sterling's case, Leech*, 103.] Upon the whole, he concluded, that the indent was not such a one as the act prescribed, being signed only by one commissioner of the treasury. That it was not, therefore, a *valid* indent, and, of course, *the forging of it was not a capital offence.* He then proceeded.

3. The third general ground, and one on which I chiefly rely is, that the indent charged to be forged, under the name of a writing obligatory, is not a writing obligatory, in the meaning of the act against forgery; and of consequence, does not come within the act. I premise that there is no distinction, and the gentlemen for the state will not be able to shew any, in law, between a *writing obligatory*, and an *obligation*. The terms, in the understanding of law, mean precisely the same thing. Every term must be taken, and explained according to *the learned* in the art to which it relates, and when a statute uses a term or phrase, known at common law, it shall be taken and understood in the common law sense. These positions I need not prove; they are familiar to the court, and are always recognised in legal discussions. Let us then try the question by these rules. It is clear, in the first place, that the terms "writing obligatory," cannot intend a *moral obligation*; it must, therefore, be understood to mean a *legal obligation*; what the law denominates such, not what may be implied in vulgar par-

lance. It is essential, then, to a legal *obligation*, or what the law calls sometimes by that name, but more frequently by the term “writing obligatory,” that it be under hand and *seal*. This is laid down in every law book, ancient and modern. I will cite a few, as specimens of the whole: 1 *Wood’s Convey.* 767. 1 *Hawk. P. C.* 186. 1 *Wood’s Convey.* 766. 3 *Inst.* 171. and 2 *Bac. Abr.* 571. The reason why a statute merchant is forgeable under the act, and a statute staple is not, is laid down to be, that the former is under the *seal of the party*, and the latter is not. (*See particularly the case above cited from Hawkins.*) In *Leech*, 66. *Dick’s* case, the twelve judges of *England* were divided whether a *Scotch* bank bill came under these words; and the prisoner was discharged upon the royal pardon. If this last case forms no authority in favour of the argument, it is equally true, that it furnishes nothing against it. From the whole tenor of all the authorities, therefore, it is manifest, that *writing obligatory* means an instrument *under seal*. The indents were *not* under seal, and therefore they come not under the description in this indictment. I will now proceed to shew, that the court can indulge no latitude of construction, nor call in the aid of intendment, to support the indictment; but that it must be so legally explicit as to support itself. Dangerous indeed would be the principle, if once adopted, that the court may, in doubtful cases, wander into the fields of imagination, and gather up remote intendments, implications, and inferences, to sustain a prosecution, where life is concerned in the event. It is a principle which this court, I am sure, would very cautiously, if not very unwillingly exercise, but which the law, for the wisest reasons, has committed to the breast of no tribunal. Lord *Mansfield* says, in so many words, “that an indictment must be explicit enough to support itself.” In *Leech*, 277. *Sea’s* case, a man was indicted for stealing a great coat out of a coach-house, which the coachman had hung up there. The stat. 11 *Wm.* excludes from the benefit of clergy, “those who shall in any shop, warehouse, coach-

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“house, or stable, privately and feloniously steal any goods, wares, or merchandises, of the value of 5s.” Upon this statute he was indicted; and it having been uniformly held, that the goods stolen must be such as are *proper to*, and are usually kept in the *respective places* which the act describes, this great coat was held not to come within the act, and the prisoner was acquitted. [Mr. Holmes then proceeded to cite and comment largely upon the following cases, in support of this doctrine, viz. *Lyon’s case*, *Leech*, 190. *Ellor’s case*, *id.* 299. *Thompson’s case*, *id.* 309. *Aickle’s case*, *id.* 378. *Cook’s case*, *id.* 109. *Woolridge’s case*, *id.* 281. *Varley’s case*, *id.* 75. (also 2 *Blac. Rep.* 682.) *Green’s case*, *id.* 432. *Morris’s case*, *id.* 403, 404, 408. *Skutt’s case*, *id.* 110.] There are various acts of parliament, he farther observed, which have been successively made, enumerating different subjects of forgery, many of which might as well have come under the denomination of *writings obligatory*, as that which is now attempted to be brought within it. 4 *Blac. Com.* 247. 250. This shews incontrovertibly, that the stat. of *Geo. II.* from which ours is copied, hath not been deemed so general and comprehensive, as is now contended. Inferences equally strong may be drawn from many of our own acts of assembly; for they have from time to time enumerated particulars: tobacco notes, paper medium, bills, special indents, &c. these were as much writings obligatory as the general indents.

4. The acquittance and receipt, indorsed upon the indent, is not such as comes under the act. 1. It is not a receipt for *money*; the interest of the *general*, being paid by *special* indents; and that by the positive institution of the law itself. Neither is money or goods mentioned in the receipt; but even if goods were mentioned, they are not charged in the indictment. The receipt, therefore, instead of being for *money*, was for *special indents*. This receipt must be taken and considered, either as connected with, or distinct from the principal indent itself. If it depends on the indent, and as I have already shewn, that was void in itself, or is

insufficiently described in the indictment, the receipt must fall with it. If the receipt be considered by itself, it has neither meaning nor tendency, and must fall by reason of its own insignificancy. But here I shall, perhaps, be met by an objection, upon which some stress will be laid: these receipts were calculated, and had a tendency to give more plausibility to the principal forgery, the indent itself. But if the indent is not a *writing obligatory*, it is no forgery under this indictment: it can reflect no properties upon any thing else, which itself does not possess. All the counts are separate and independent; they must stand or fall by their own intrinsic qualities; they cannot borrow from one another; and at all events, one bad one cannot supply the defect of another. But it is also laid, in the indictment, to have been done *with an intention to defraud* several persons. In whatever point of view it be considered, it could tend to the injury of no person, but him to whom the indent belonged at the time of the alteration. Could it defraud the men whose names were mentioned or subscribed to the receipts? No: for they had successively parted with their property in the indent. It had passed them in the course of transfer; it went therefore neither to charge them with the *payment* of any money, nor to diminish any sums they might be entitled to receive. Could it injure *John D. Vale*? No: for he paid no money for the sums mentioned in the receipts, but for the balance due upon the indent, *after deducting the receipts*. Could it injure *John Edwards*? No: for he, as *John Edwards*, was never liable to pay the indent. Could it injure the state? No: for it went to *exonerate*, and not to *charge* the state. The debt due from them upon the face of the indent, was *diminished* by the amount of the receipts upon the back of it. Nay, the whole transaction has operated to the *benefit* of the state; for the indent, which was at first good for a *small sum*, by being thus altered, has become void even for that. If it injured any one, therefore, it was the person who held the indent at the time of the forgery. But if no person is

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hurt, but the person doing the act, it is no forgery. Forgery is where a person fraudulently makes and publishes false writings, to the prejudice of *another man's* right. *Salk.* 375. *Ld. Raym.* 787.

Lastly, *The uncertainty how this receipt could operate*, prevents its being within the act. *Russell's case*, in *Leach*, p. 9. was an instance, where the prisoner was discharged, because the *acquittance or receipt* was “a confused memorandum, the import of which it was impossible to collect with precise certainty.” Upon the whole, therefore, how criminal soever the prisoner at the bar may have been; how much soever the public mind may be outraged by his proceedings; neither his baseness, nor their irritation, can change the law; neither can they subvert those salutary principles which its cooler wisdom has prescribed, for the equal safety of all men. And the law having declared, that where the offence is indeterminate or imperfectly described, it cannot bring its penalties to bear upon the offender; I trust that, in this instance, the judgment will be arrested.

*Read,\** for the state. In compliance with a request which had been made to me, to assist the honourable gentleman who prosecutes for the state, I shall endeavour to answer the arguments of the prisoner's counsel; in doing which, I shall pursue the same method which they adopted. And though many of the arguments, at first sight, carry with them a considerable degree of plausibility, yet, unfortunately for the prisoner, they vanish upon a nearer view, and, ultimately, they admit of such complete answers, as will destroy the grounds on which he hopes for a discharge from this prosecution. The first objection is, that the indictment itself is defective; we must inquire what an indictment is, and what are its leading properties. Of the

\* This being a case of original impression, and of much public expectation, and gentlemen of the bar not willing to come forward against a prisoner in a capital case, at the instance of the prosecutors, Mr. Attorney-General applied to the governor, to assign him counsel to assist on behalf of the state; whereupon his excellency appointed colonel *Read*, who, at his instance, joined in the argument.



former, we have an account in 4 *Black. Com.* 302. and of the latter, in 306. "They must have a precise and sufficient "certainty;" and again, "The offence itself must be set "forth with clearness and certainty." I will apply this doctrine to the case before the court. It is plain, in the first place, that it is not inconsiderable slips, or minute omissions that will vitiate, provided the *offence* be described. The concluding words in the indictment were first objected to. (*The court stopped Col. Read on this part. Mr. Chief Justice.* Our minds are made up upon that part; clearly the conclusion is right, and pursues the constitution. Had the indictment stopped at the word "same," as the prisoner's counsel contend, it would have made nonsense, for the immediate antecedent is, "*the act of the general assembly;*" and the indictment would, in such case, have concluded, not against the peace and dignity *of the state*, which the constitution requires, but against the peace and dignity of the *act of the general assembly*. The addition of the word "state," therefore, was necessary.)

*Read* proceeded. The second objection under the first ground was, that the indictment states the indent to have been issued by *John Edwards*, "late treasurer," instead of "treasurer at the time the indent was issued." This objection would have come with considerable force, had the present been an indictment against *John Edwards*, for malfeasance in office. It would then have been apposite; the indictment must indeed have stated expressly that he was treasurer, or in office, at *the time of the offence*; because, as *treasurer*, he would have been accused; and the fact of his being treasurer, being a part of the *gist* of the crime, it must be "clearly and certainly" set forth. With this distinction, let us enter into the case of *Rex v. Knight and Burton*, *Ld. Raym.* 527. which has been relied upon for the prisoner. *Knight* was charged as "*nuper receptor generalis custumarum,*" late receiver of the general customs; and, as such, falsely indorsed several exchequer bills. Here the exception was taken, that the defendant was charged as

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*late receiver, instead of receiver at the time of making the false indorsement, &c.* and the judgment was arrested. But here, as I have just observed, the indictment was against the *officer himself*, for a malfeasance in office. It charged him with a particular offence in office, without alleging that he was an officer at the time. It was quite unlike the present case. In the one, it was essential ; in the other, it was inducement. This distinction destroys the force of that case, and with it, the objection that has been made on the present occasion.

2. That the indent was issued by one treasurer only. By recurring to the act, under which the indents were issued, we find nothing to warrant this exception. "The treasurers shall give," &c. What does this mean? Why, that the *treasurers* shall deliver forth the engagements of the state. It does not say, nor imply, that both shall sign ; nay, it does not say that *either* shall sign. Now, who can say that this indent was not delivered forth by *both*? The contrary does not appear. But I contend, that one was sufficient. What were the reasons for having two treasurers? Not surely, that both might be constantly employed in the *same act*. It would be unnecessary and absurd. Suppose one of them should be gone into the country for a few days, or be sick and unable to attend, must the public business stop for that reason? Surely not. On the contrary, it is to provide for the more easy and more certain despatch of the business of so extensive a department, that two persons are appointed. Had this been a new offence, created by statute, (and not known at common law,) where greater precision is requisite, the objection might have had more force. But this incident is clearly warranted by law. It is in the common form in which indents are issued and known ; the public consider them valid, by receiving them ; the state, by providing for their payment ; and the law, by *recognising* them in various acts, which have subsequently been passed relative to them. They are, therefore, a legal subject of forgery.

3. I allege, that this indent is a writing obligatory. In 2 *Black. Com.* 511. debts due by statute are anterior to all others—anterior to bonds. Certainly they must be considered so in criminal as well as civil cases. It is a writing obligatory in another view. It is the engagement of the state *under seal*. I say under seal; for the seal of the state is affixed to the act under which they are issued. It is the only way in which the state can make a writing obligatory. They must pass an act, and ratify it with their seal. Upon this indent the state may be sued under the federal government. I say, that *debt* only would lie in such case, in which they would be charged under their own *seal*. But the jury have saved much argument, by finding it to be a writing obligatory; we cannot now contradict the finding of the jury. An argument has been drawn from the act of the 26th of *March, 1784*. In 1785, the legislature found that the special indents were not protected by law; they passed a clause in the tax law, making it felony to counterfeit them. This they pursued in the subsequent tax bills. Why did they not provide for the general indents in like manner? Were they not aware that the latter were equally liable to be forged? Or, were they objects of less consequence? No: but they knew that the general indents were provided for, and protected by the general law. This was a silent legislative construction of the law before the court, and ought to have great weight. It is true, the paper currency and tobacco notes have been specifically mentioned; but this does not invalidate the answer already given. It is clearly a writing obligatory; because it is *written*; imports an *obligation* upon the face of it, *binding* the state for the payment of money; and draws its force and efficacy from the *seal* of the state. An action of *debt* would lie upon it, and the general issue would be *non est factum*.

4. I come now to the fourth ground—upon the receipts. The gentleman in behalf of the prisoner argued from the case in *Ld. Raym.* 527. that if the forgery could injure no one but the *party himself*, it is no crime. The case before

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the court essentially differs from that case, as I have already shewn in one instance, and as I will now shew in another. There it was a forgery of an acquittance upon the back of a *valid* writing; here it was upon the back of a *forged* one; not indeed to exonerate, but to give force and efficacy, plausibility and success, to the forgery itself. It is said that this indent is no forgery within the act; I trust I have shewn that the indent *is a forgery* within the act. But I allege that a derivative may sometimes be the greatest crime; it often stands so related to the principal, as to give effect to both. The principal may be that which directly does the injury, provided it be successful; the attendant may be that which gives the success. It was so in the present case. If it be alleged, that the names subscribed to the several receipts, are fictitious ones, still the crime is not lessened; for *Ann Lewis's* case, in *Foster*, 116. furnishes an answer. There she had been indicted for feloniously uttering and publishing a counterfeit deed, purporting to be a power of attorney, from *Elizabeth Tingle, &c.* It appeared that no such person as *Elizabeth Tingle* was ever *in rerum natura*. Upon this a doubt arose, under the words of Lord Coke, viz. "That the act must be done *in the name of another person.*" But upon full consideration, the judgment was given against the prisoner. In a late case in *England*, it has been laid down, that the intent to defraud is the chief ingredient in forgery. (*Read* had a note of that case published in a newspaper, but the court inclined that it would be improperly read as an authority.) The case cited by the gentleman for the prisoner, from *Leech*, 277. *Sea's* case, cannot be law; it is repugnant to common sense, that because a great coat was not usually deposited in a coach-house, it did not come within the act, the words of which are general. It is a forced construction; and one of that kind does more injury, by tempting to the hopes of impunity, than twenty pardons for capital offences. [Here he took up the cases cited from *Leech*, and went through them minutely; distinguishing them from the case before the

court, and shewing them not to apply.] Another ground taken by the counsel for the prisoner is, that the receipts *were not for money*; but that they are for special indents. It is now too late to controvert that fact. It is fully charged in the indictment to be *for money*, and the jury have found it so. We cannot travel out of the record; we must take the verdict to be true. But it has also been argued, that no one was injured or defrauded: I answer, *John David Vale* was both defrauded and injured. The whole transaction went to work a fraud and injury upon him. He bought the forged indent, and must now lose the money he paid for it. I had almost forgotten to answer the case in *Leech*, 368. *Moffatt's* case. There he had forged an inland bill of exchange, which bill was not drawn in the form prescribed by the act of parliament, and it was therefore held to be no capital offence. This case was much relied upon; but it is to be observed, that an *act of parliament* had made all bills not drawn in that form *void*. But has any act of assembly declared our indents *void*, because one treasurer only had signed them? By no means; but the very reverse. The legislature has recognised them in various acts. Amongst others, they have enacted, that the holders shall not be allowed, in the courts of the state, to set them up in discount, where they were prosecuted for taxes. Surely if the indents were void in themselves, such an interference would have been quite unnecessary. Every act which appointed special indents to be issued, for payment of the interest arising upon the general indents, is a legislative confirmation of the latter, and forms an insuperable barrier against the argument drawn from the circumstance of their being signed by one treasurer only. Thus, then, notwithstanding the learning, ingenuity and eloquence, which have been employed in behalf of the unfortunate prisoner at the bar; close and subtile as the reasoning and distinctions have been, he cannot be screened from that sentence which the law has affixed to his crime. The crime is amply and aptly charged in the indictment; the jury have brought it

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home to him by a general verdict of "guilty." That verdict cures most of the exceptions taken, even if they were valid. It convicts him, amongst other things, of *forging and uttering an acquittance and receipt for money, with intention to defraud John D. Vale*. This, of itself, would be enough to subject him to the penalties of the law ; to preclude all hopes of escape, by the aid of legal exception.

*Moultrie*, attorney-general. This case has already been so well argued, and the objections on behalf of the prisoner so ably and satisfactorily answered, that I shall just touch some of them, and, in general, add a few observations and some additional cases. 1. The first subdivision under the first general ground has been overruled. 2. That the indent was issued by *John Edwards*, late treasurer. The indictment recites the commission, alleges that *John Edwards* was entrusted to sign and issue indents, and that the state was bound for the payment of the money. If we can prove that he was so authorised and entrusted, *the time when* is immaterial, provided also we can prove that an indent, issued and signed by him, has been forged. This is laid in the indictment, and found by the jury. If *John Edwards* were not treasurer at the time of issuing the indent, it would have been a proper ground before the jury, who would have inquired into the fact. But, under the verdict, that fact is now to be intended ; the verdict cures the defect, if this was one ; though it has been fully shewn to be sufficiently explicit.


2. The second general ground is, that the indent is not regularly issued ; inasmuch as that one treasurer only signed it, when the law delegated that authority to both. We must recur to the acts under which the indents were issued. The first act was of the 12th of *March*, 1783, and gives the power to "the commissioners of the treasury, or either of them." The next act was of the 16th of *March*, 1783 ; but does this second act contravene the former ? It says, indeed, that "the commissioners shall give such creditor a treasury indent." But this was not delegating a new power. The

treasurers, "or either" of them, possessed the power under an act passed four days before. If this latter act gave the original power of itself, then it might with some shadow of plausibility be argued, that it was joint and not several. But they possessed the power jointly and severally, under the former act: and the only question is, whether the words of the latter, by re-enacting one part of the former, impliedly (for it cannot be contended that it expressly) repealed the other? Surely not; for the words are not contrary or repugnant; and the rule is "*leges posteriores priores contrarias abrogant.*" 1 *Black. Com.* 89. And the learned judge expounds it thus, "But this is to be understood *only* when the latter statute is couched in *negative terms*; or where its matter is so *clearly* repugnant, that it *necessarily implies* a negative. Now apply this doctrine: 1. There are no *negative words* in the latter statute, so it comes not within the first branch of the definition. 2. The matter is not at all *repugnant*; for it is very consistent that two persons or agents should have powers *jointly and severally*, to act in their office or agency. It is the most common method of giving powers. And, 3. The words are so far from being so repugnant, as *necessarily to imply* a negative; they are so fully consistent, that it is *impossible to imply one*. It has been said, that the indents began "We, the commissioners," &c. Granted. But did either of the acts prescribe any form? No: it left that part to the discretion of the treasurers; and their agreeing to, and adopting a particular form, does not govern the law. But admitting for a moment, all that is contended on this point, I deny the inference. I contend, that if the indent were even illegal, by reason of its being signed by one treasurer only; still it is forgery under the act, to counterfeit such indent, if it purported on its face to be good, and was generally received as such. I prove it from *Stirling's case*, *Leech*, 103. He had been convicted for forging the last will and testament of *Elizabeth Shutter*; in which he had devised and bequeathed to himself 350*l.* *South Sea* annuities; himself named sole

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executor. He proved the will, by taking the usual oaths before the surrogate. He took the probate, and entered it at the *South Sea House*; and afterwards sold out 350*l.* stock. The supposed testatrix was herself produced at the trial as a witness, who swore, that neither the will, nor the hand-writing, was her's. The doubt was, whether, as the supposed testatrix was living, the prisoner could be said to have forged *her last will and testament*, as the law knows of no such instrument *until after the death of the person making it*. But the court determined, "that an instrument may  
 "be the subject of forgery, although, in fact, it should appear impossible for such a one to exist; *provided the instrument purports on the face of it, to be good and valid,*  
 "as to the purposes for which it was intended to be made." The prisoner received sentence of death. The case cited for the prisoner, from *Leech*, 368. (*Moffatt's case*,) does not apply. There a statute prescribed and required a particular form for an inland bill of exchange. But the law has prescribed no particular form for the indents; it left that matter to the discretion of the commissioners of the treasury.

3. The import of the word "obligation," has been much dwelt upon. But this word is neither found in the statute, nor implied in the indictment; "writing obligatory" is the phrase. Now what is the meaning of these words? The word "*writing*," is a noun-substantive; a general term expressing something that is *written*, but indicating nothing in particular. "*Obligatory*" is an adjective, descriptive of its *quality*. Now no one can say, that an indent is not a *writing*; and it is *obligatory*, because it *obliges* the treasurers of the state to pay the money stipulated therein. It imposes an obligation upon the state to receive it in payment at the treasury. It creates a public debt; it imposes a public obligation. The whole object of the statute of 5 of *Eliz.* relates to lands; the case cited from *Hawk.* 186. depends entirely on that statute, which says, "*bill, &c. sealed.*" The statute of frauds intervened, which very mate-



nally changed the nature of contracts. It enabled lands to pass by writing without seal. It then became necessary to pass the statute of *George*; where the legislature, as a *nommen generalissimum*, use the words "writing obligatory," to comprehend all cases and all writings introduced by the statute of frauds. [Here Mr. Attorney cited *Eq. Ca. Abr.* 21. ca. 10. *Id.* 22. ca. 17. 1 *Hawk.* 342. (new edit.) and 2 *Bac. Abr.* 571.] It has been said by the gentlemen for the prisoner, that general words are never added after particular ones: I reply, that it is very common. In *Crow. Cir. Comp.* 491. the words "*ship or other vessel.*" *Id.* 365. "*bond or warrants.*" In our act of assembly against gaming, particular games are first set down, and then added these general words, "or any other pastime or game." Again, *Crow. Cir. Comp.* 263. "or dead victual whatsoever." Thus, from these considerations, which have been enforced by the gentleman who preceded me, it is abundantly manifest, that this crime is well described, under the words "writing obligatory," and the arguments against it obviated. Now, there are four charges in this indictment. 1. For forging. 2. For uttering the indent itself. 3. For forging. And, 4. For uttering the acquittances and receipts. I trust I have already proved, that the indent is a writing obligatory. The words of it are strong and pertinent, viz. "The treasury is made liable, and the faith of the state pledged." It has already been well observed, that the legislature considered them so. They passed a law to prevent the treasurers from being sued upon them; they passed another law to prevent the holders from setting them up in discount against the public demands for duties and taxes. In 2 *Black. Com.* 511. a debt due by statute is laid down as paramount and prior to a debt due by bond. It is, therefore, the highest and the greatest. But *omne majus continet in se minus*; the greater always comprehends the less. The same law is laid down in *Law of Ev.* p. 7. The words "for payment of money," in the act, are not annexed to the words *writing obligatory*; those follow the words

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"promissory note." A writing obligatory is a compulsory contract, whether it be made for payment of money, or not. But there is a case in *Leech*, 389. *Cogan's* case, which comes home to the argument before the court. There the *intention to defraud* is put as the gist of the crime. It is there said not to come within the *letter*, but within the *meaning* of the law. It is impossible to excite a real doubt in the mind of any one, but what this crime comes within the *meaning* of the act. But the verdict of the jury in the present case, cuts off much argument that might otherwise be used. They have *found the indent to be a writing obligatory*. The court cannot travel out of the finding of the jury. The case of *Rex v. Elliott*, *Leech*, 185. has considerable application to this case. There the prisoner had forged a bank note; but it was done upon a paper which had not the common *water-marks*, which distinguish the real bank notes, and the promise was "to pay to Mr. *Joseph Cooke*, or "order, *fifty*," without adding pounds, shillings, or pence. The judge left it with the jury to say, whether the word *fifty* imported pounds; and they found him guilty upon the count which charged him with forging "a certain promissory note for the *payment of money*, with intention to defraud the bank of *England*." Two exceptions were taken in arrest of judgment: 1. That it could be no counterfeit of a bank note, because it wanted the water-marks. 2. That it was charged to be for *payment of money*; but by the very tenor of it, *non constat* to be for money—as it says *fifty*, without saying what. But the judges held the verdict to be legal. It resembling the original, and having an aptness to impose, seems to be the ground of conviction; so, in the present case, the indent not only had an aptness to impose, but it really did impose. In *Leech*, 239. *Lavell's* case, a bill of exchange was drawn on "Messrs. *Drummond, Charing-Cross*," and laid to be drawn on "Messrs. *Drummond & Co. Charing-Cross*." The court rejected the words *& Co.* and held the conviction to be legal; adding, that if any person can be intended from the words, who that

*person is, and whether he was the meditated object of the fraud, are matters for the consideration of the jury.* So, also, the verdict in the present case has established who the meditated object of the fraud was, viz. *John D. Vale*. Hence, therefore, we cannot contradict this verdict; that he forged and uttered this writing obligatory with an intention to defraud *John D. Vale*.

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3 and 4. I come now to the acquittances and receipts. It is said, that this is not such an acquittance and discharge, as the act requires. *John Stirling's* case, in *Leech*, 103. furnishes an answer. The judges lay it down, "that an instrument may be the subject of forgery, although, in fact, it should appear impossible for such an instrument, as the instrument forged, to exist; provided it purports on the face of it to be good and valid, as to the purposes for which it was intended to be made." Now this receipt not only purports to be a receipt for money; but it was actually so. In *Dr. Dodd's* case, as it is abridged in *Crow. Cir. Comp.* the receipt on the back of the bond was in figures, with the sign of pounds, shillings, and pence, prefixed; the same as on the back of this indent. But the indictment charges it to be a receipt for money; and the jury have found it. This is conclusive. It was a question proper for their consideration, the same as the word *fifty* was, in *Elliott's* case, already cited; their finding is therefore definitive. I will add one case under this head, which is *Stubb's* case, *Crow. Cir. Comp.* 293. There was a separate count upon the "receipt, which it is said, purports to be a receipt, acquittance and discharge." No exception taken that it was not expressly charged to be such. But this is an acquittance by the funding system, which says, the money shall be paid, &c. The receipt, therefore, was good for money, for it acquits the public of, and from so much money as is expressed to have been received. The last part of the charge is, the intention to defraud. This, no doubt, is essential, consistent with the crime; without this, the crime would be incomplete, and the prisoner could not be punished by our

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law. But there is no necessity for going into reasonings or cases, to establish this; because it is amply charged by the indictment, *and found by the jury*. We cannot contradict the *verdictum* of the jury, before whom it was an essential question of pure fact. The court are bound down to take it for true. Thus I have gone through the several objections; which, though plausible at first impression, all admit of most conclusive and satisfactory answers. The prisoner, therefore, being legally convicted, it is my duty to move your honours, that the sentence of the law be pronounced upon him.

The prisoner was remanded.

*Cur. adv. vult.*

And now on *Monday*, the 14th of *March*, 1791, the prisoner was again set to the bar, present, Mr. *Chief Justice*, Mr. Justice *Grimke*, and Mr. Justice *Bay*; when the Chief Justice delivered the opinion of the court.

RUTLEDGE, Ch. J. The indictment against the prisoner is very specially drawn, and contains several counts. It charges him in the words of the act of assembly, with having falsely made, forged and counterfeited; with having caused and procured to be falsely made, forged and counterfeited; and with having willingly assisted in the false making, forging, and counterfeiting a writing obligatory, which is commonly called, and well known by the name of an indent of this state; the writing is set forth *verbatim*. It also charges him with having uttered as *true*, a forged and counterfeit writing obligatory, purporting to be an indent, and set forth *verbatim*, knowing it to be so. And it charges him in like manner with forging, with procuring to be forged, and with assisting in the forgery of several receipts for *money*, on the said indent; and with uttering as true, such forged receipts for money on said indent, knowing such receipts to be forged. And all these acts are laid to be done with in-

tent to defraud the several persons mentioned in the indictment, and contrary to the act of assembly, in such case made and provided. The prisoner being found guilty, has offered, in arrest of judgment, the following objections. [Mr. *Chief Justice* here stated the several objections, precisely as they had been laid down by the counsel for the prisoner, *vide ante*.] These several points have been argued with ability and ingenuity, at the bar; we have heard them with great attention, and have since maturely considered them. With regard to the first objection, we consider it as we did at the argument, as of no weight. The indictment, had it stopped at the word "*same*," would have been faulty, and not as the constitution directs. It directs, that all prosecutions shall be carried on in the name, and by the authority of the state of *South-Carolina*, and conclude against the peace and dignity of the *same*. In this clause of the constitution, *state* is the antecedent to the word *same*, to which it refers, and there was no need to add the word *state*. But towards the end of this indictment, *act of assembly*, not *state*, is the antecedent. There was a necessity, therefore, to add the word *state* after the word *same*; otherwise the conclusion would have been against the peace and dignity (not of the state, but) *of the act of assembly*. Another objection was, that the acquittance and receipt charged, was not such as come within the act. This act, which was passed the 5th of *March*, 1736, was made, as the title declares, for putting in force part of the statutes of 2 and 7 *Geo. II.* and incorporates such parts thereof as relates to this offence. And the third clause, on which the present indictment is founded, is in these words. [Here Mr. *Chief Justice* read the clause; which being lengthy, I refer the reader to the public laws, page .] The arguments in support of this objection, were substantially as follow: That to make forgery, felony within this act, it must be done with intention to defraud; and that these receipts were not intended to defraud. Who, say they, were to be defrauded? Not the treasurers, because several years interest were released:

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Not the party to whom the indent was transferred, because he took it with the receipts upon it, and, consequently, had no right to the interest which appeared to have been paid. That the law means a receipt, the forging of which would tend to deprive some person of his right ; but this is only a relinquishment by the prisoner, of his claim on the treasury for so much interest ; therefore, that the receipt could only injure himself. The forging such a receipt was compared to the case of *Rex v. Knight, Salk. 375.* Another ground was, that if the counts on the indent itself be not felony ; (which they had before contended, on the ground of its not being a *writing obligatory*, within the act,) those on the receipts cannot be felony ; for it cannot be more criminal to counterfeit the receipts, than the indent ; unconnected with which, the receipt is perfectly innocent. The last ground was, that the receipts were neither for *money* nor *goods*, which the act requires they should be. But special indents are paid for the interest on general indents ; therefore, the receipts must be considered for special indents only, and they are not for money. That money has no *ear-mark*, which special indents have ; neither are they *goods*. The receipt, therefore, being neither for *money* nor *goods*, comes not within the act. These arguments rest on three grounds ; 1. That the receipt was not given with intention to defraud. 2. That if it was not felony to counterfeit the indent, it could not be felony to forge the receipt. 3. That the receipt was not given for *money* or *goods*. Although these arguments may at first view appear ingenious and plausible, yet, on examination, they will be found altogether destitute of solidity. The only point on which we agree with the prisoner's counsel, is, that to make forgery, felony under this act, it must be done with *intention to defraud*. It surely must. It is the essence of the crime. But they say these receipts were not intended to defraud either the *treasurers* or *Vale*. But the jury have found that it was with intent to defraud *both*. They were the judges of that fact : we cannot say they were mistaken. It is of no consequence whether any

person was actually defrauded or not ; if the forgery was done with intention to defraud, it is sufficient, and that is found. We will cite some leading cases, which warrant this opinion. From 1 *Hawk. P. C.* c. 70. s. 2. "The notion of forgery doth not seem so much to consist in the counterfeiting a man's hand, which may often be done innocently, but *in the endeavouring to give an appearance of truth to a mere deceit and falsity ; and to impose that upon the world as the solemn act of another, which he is no way privy to,*" &c. This was the idea of forgery at common law ; it is the same under the statute. *Strange*, 747. *Ward's* case. It is not necessary to shew an *actual prejudice* ; a possibility is enough. And a case from *Stiles*, p. 12. is there referred to, of an indictment at common law, for forgery of a letter of credit to raise money ; and nobody, says the book, imagined that the indictment did not lie, though it was not said that he actually received money on the letter of credit. 2 *Black. Rep.* 787. That it is sufficient to aver a general intention to defraud a certain person, which intention must be made out by facts at the trial. It is not necessary to set forth particularly the manner in which the fraud is to operate. Solemnly adjudged by all the judges at Lord *Mansfield's* chambers.

The case quoted by the prisoner's counsel, that of erasing the word "pounds" in a bond, and inserting *marks*, is not a forgery, because the sum is thereby *lessened*, which cannot injure the obligor, but affects only the obligee, will be found, on examination, not to have any avail in a case like this. The law there laid down is good ; but the reason on which it is grounded does not apply here. 1 *Hawk.* c. 70. s. 4. (2 *Bac.* 567.) "It is no forgery in one who raseth the word *libris* in a bond given to himself, and inserts *marcis* ; because here is no appearance of a fraudulent design to cheat another, the alteration being prejudicial to him who makes it. But it would be forgery, if by the circumstances of the case, it should any way appear to have been done with an eye of gaining an advantage to the party himself, who

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" makes it, or of defrauding a third person." This was the case of a good bond ; of a bond made to the man himself ; it was a case at common law ; yet there it was said it would be forgery, if done with an intention to defraud. *Leech*, 189. *Harrison's case*. Prisoner was convicted on the statute of 2 Geo. II. c. 25. and 31 Geo. II. c. 22. (which extends the former to corporations,) for forging a receipt for money, with intention to defraud the *London Assurance Company*. He was accountant to the company, who kept their cash at the bank of *England*, where they had paid 210*l.* which was entered by *Clifford*, a cashier at the bank, in *their* bank book thus : " 1777, *June* 16th. Bank notes. "*Clifford*. 210*l.*" The prisoner altered this entry by prefixing the figure 3, which made it read 3,210*l.* The question referred to the twelve judges was, whether this was a receipt within the meaning of the statute ? And they were unanimously of opinion it was. I mention this case to shew, that although it might have been urged, that this could not have been done with intention to defraud the *London Assurance Company*, because it appeared to be for their advantage to have credit for 3,000*l.* more than they had paid ; yet no such objection was made, or it was not regarded. They could have no right to credit for more than they had paid ; and the conviction was held to be legal. From these cases, and a variety of others that might be adduced, it is clear, that in order to make forgery felony under this act, it is only necessary that it should be done *mala fide*, with intention to defraud some person. It is not necessary to lay or to prove, that any person was actually defrauded. And this upon good reasons ; because the forgery may be discovered, and the party apprehended for prosecution, before the fraud intended could be thoroughly effected. *The intention constitutes the crime.*

The counsel for the prisoner contended further, that if the counterfeiting the indent was not felony, counterfeiting the *receipts* could not be felony ; for it cannot be more criminal to counterfeit the receipt, than the indent ; and un-



connected with the indent, the receipt is perfectly innocent. But this we conceive to be false and inconclusive reasoning; and that the transactions of counterfeiting the indent, and forging the receipt, may be considered and determined upon, as totally independent of each other. The charge with respect to the receipt is for *forging a receipt for money, with intention to defraud certain persons*. And it is of no consequence *on what* those receipts were written; whether on the back of an indent, on the back of a lottery ticket, on a sheet of paper, or on the margin of a newspaper. If the receipt was for money; if it was forged; if it was forged with intention to defraud any person, that is sufficient to constitute it felony under the act. It was further alleged, that these receipts are not for money or goods, but must be considered as given for *special indents*, which are neither one nor the other. It is clear that the receipts are not for goods; but it is laid in the indictment that they were for money; and the fact is so found by the jury. There are two modern cases that shew, that the court have not been very strict on this head, where the intention to defraud has been manifest, always keeping that in view as the foundation of every thing. The one was the case of *James Elliott*, in 1777, *Leech*, 185. He was indicted for forging a bank note, whereby *Thomas Thompson*, for the governor and company of the bank of England, *promised to pay Joseph Crooke, or bearer, on demand, fifty*; and the indictment charged it to be a promissory note for the payment of money. It was contended for the prisoner, that the word *pounds* being omitted in the body of the note, it was not a note for payment of money; or if it was, it was totally uncertain what coin, whether pounds or shillings; and that on such an uncertainty in a declaration, a plaintiff would be nonsuited. The judge left it with the jury to consider, whether the word *fifty* imported pounds; and they found the prisoner guilty on that count which charged him with *having forged a promissory note for payment of money, with intention to defraud the bank of England*. And on this ob-

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jection being renewed, by way of motion in arrest of judgment, before the judges at *Serjeants-Inn*, they were unanimously of opinion the verdict was legal. The other case was that of *John Taylor*, 1779, *Leech*, 214. He was indicted for that having in his possession, a bill of exchange drawn by *Thomas Harper* on *Joseph Cuff*, for 20*l.* he forged a receipt and acquittance *for the said sum*, as follows, viz. "Rec'd. *William Wilson*," with intent to defraud the said *Joseph Cuff*. He was convicted; and the twelve judges were of opinion the conviction was legal. With respect to the special indents, the tax act under which they were issued made them redeemable or exchangeable at the treasury, for gold or silver, at certain periods, &c., that the man who had them, might probably, if he kept them by him, get the full amount. But if he chose to part with them, he could at any time *get money* for them, though he could not dispose of them *at par*. However, *it does not appear*, that special indents were paid. They might have been, and they might not have been considered as money. The fact we suppose is, that neither money nor special indents were paid, because the receipt is charged to be *forged*, and found so. It is said to be for two years' interest; but it is also said to be for 86*l.* 2*s.* 6*d.* making total two years' interest. Though the receipt is for those sums, in figures, the operation is the same as if it had been in words at length. We are, therefore, of opinion, that this objection must be overruled. It is immaterial to consider any of the other objections which have been offered; because the first and last objection being overruled, it follows, that the prisoner is lawfully convicted of having forged a receipt for money, with intention to defraud the persons mentioned in the indictment; and that such a forgery is, by the act of assembly, felony without benefit of clergy. We would not, however, be understood, as according to the doctrine laid down by the prisoner's counsel in their other objections. We have been more diffuse in delivering this opinion than is usual, or perhaps was necessary. But this be-

ing a case of great importance to the public and to the prisoner, and his counsel appearing to lay great stress on this objection, we considered it proper to state thus fully the reasons upon which our decision is founded.

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*The prisoner being asked* by the clerk, what he had further to offer why sentence of death should not be pronounced against him according to law ; replied, that he had nothing further to offer.

His honor the Chief Justice then (*calling him prisoner\**) briefly stated to him the crime for which he had been indicted ; the deliberate trial thereupon, in which he had the assistance of able counsel, and that he had been duly convicted by the oaths of twelve of his peers ; that he had afterwards appealed to the court upon several legal exceptions in arrest of judgment ; that those exceptions had also been ably argued by his counsel, patiently attended to, and maturely considered by the court, and for the substantial reasons this day stated by them, had also been overruled. That having now nothing further to offer, it was incumbent on the court to pronounce the sentence of the law against him. That the laws of his country demanded no less than his life as the penalty of his crime. His honour then dilated upon the enormity and ruinous tendency of this crime, in all countries, and especially in a commercial community, and strongly painted the heinousness of the guilt, in a civil, a moral, and a religious view. That as a citizen, he had grossly infringed the public rights ; as a man, he had broken through the obligations of honour and integrity ; and as a christian, he had violated the most wholesome precepts of religion. That from a person of his education and habits, better things were to have been expected. That

\* The reader must have observed, that he was indicted under several names. He had long gone by the name of *Washington* ; but it had often been suspected, and from circumstances latterly transpired, is not now doubted to have been an assumed name. It is said that his real name was *Welch*.

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the court pitied his delusion, and hoped that he felt on that solemn occasion as he ought to feel ; recommending to him, in a very pathetic manner, to employ that little interval of life which remained, in making his peace with that God whose law he had offended ; and suggesting, as an additional motive, that from the malignity of his offence, the court could not flatter him with any hope of pardon. He then concluded an affecting address, and sentenced him, the prisoner at the bar, to be taken to the place from whence he came, from thence to the place of execution, and there, on *Wednesday*, the 23d of the present month, between the hours of ten and two, to be hanged by the neck until his body is dead, and prayed that the Lord might have mercy on his soul !

He was executed according to sentence, but not on the 23d of *March*, as the court had granted him one week's respite in order to settle his private affairs, which had been complicated, and in a great state of derangement.



### COVINGTON *against* The Executors of LIDE.


*Spring Circuit,  
Cheraw District.*

In a special action on the case, a plaintiff may recover less damages than those laid in his declaration, though he cannot recover more. Though in covenant, where a penalty is fixed for the breach, there that sum only can be recovered.

THIS was an action of *assumpsit*, founded on a special agreement. The declaration stated in substance, that the plaintiff had agreed to build a boat for the defendants' testator, *Lide*, which should carry 1,000 bushels of corn from *Cheraws* to *Georgetown* ; for which he (*Lide*) agreed to give plaintiff the same quantity of merchantable corn, and to pay him at the rate of 2s. 6d. per bushel for all the boat should carry more than the 1,000 bushels.

On the trial, however, the witnesses proved that the deceased agreed to pay at the rate of 2s. 4d. for every bushel the boat could carry over and above the one thousand, (being two-pence per bushel less than stated in the declaration)

and that the boat, when finished, could carry 1,100 bushels, which was 100 more than she was originally supposed to carry, and consequently the sum to be paid was 50 dollars.

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Upon closing the evidence on part of plaintiff,

*Falconer* moved for a nonsuit, on the ground that the plaintiff had not proved his case as stated in the declaration, for that the witnesses had all proved that the deceased had agreed to pay 2s. 4d. instead of 2s. 6d. per bushel, for whatever excess of quantity the boat could carry, which was a variance between the count and the evidence in support of it.

BAY, J. before whom this cause was tried, expressed his surprise, that the defendants' counsel, in whose favour the difference of the two-pence per bushel appeared to be, should apply for a nonsuit on that ground, as it was an evident advantage to them. He admitted that it had been formerly held, that a plaintiff could not recover *more* or *less* damages than what were charged in the declaration; and that there were cases in the books, where verdicts had been set aside on that account; as in the case of *Bagnall v. Sacheverel*, *Cro. Eliz.* 292. but this was an *obsolete* doctrine at this day. The modern improvement of our legal system had rejected and discarded such unreasonable distinctions, as contrary to every principle of natural justice; for that the plaintiff might recover less damages than those laid in the declaration, particularly in all actions of *assumpsit*, which sound in damages. In every case of this kind, either *express* or *implied*, the damages must follow, and never can extend further than the sum really due; and it is the province of a jury to determine that amount. Though in actions of covenant, where a sum is fixed for a *breach*, there the very sum, and no less, can be found. *Say. Law of Dam.* 43, 44, 45. *2 Burr.* 904. *4 Burr.* 2225.

The motion for a nonsuit was therefore overruled, and the jury gave a verdict for plaintiff.

1791.

Covington  
v.  
Executors of  
Lide.

*Falconer* then gave notice of a motion in arrest of judgment; and in *November* following, the case was brought forward at *Columbia*, before the Chief Justice, and Justices *BURKE*, *GRIMKE*, and *BAY*. On report of the judge who presided at the trial, the court, without hearing any argument,

Dismissed the motion.



Spring Cir-  
cuit, Camden  
District.

### HOLMES against HOOPER.

The payee of a negotiable note may restrain its negotiability; but if after a subsequent indorser makes it payable to order, he shall be liable to the subsequent indorser.

CASE on an indorsed note by indorsee, against indorser.


*Ford*, for the plaintiff, produced, in evidence, a negotiable note of hand from *Patrick Carnes*, deceased, dated the 18th *December*, 1785, payable to *John Walker*, for £.

on 1st *January*, 1787. On the back of this note, *Walker* made a transfer of his right, and gave the defendant, *Hooper*, a power to sue in his name, and to appropriate the money to his own use, when recovered; but *did not make it payable to order*. After *Hooper* got this note, he negotiated it to plaintiff, and made it *payable to order*.

*Hunt*, for defendant, produced a receipt in full from *Holmes* to him, up to 18th *August*, 1788, and then took two grounds of defence: First, that the negotiability of this note was restrained by the original payee; and secondly, that supposing it was not, the receipt in full was a bar to the action.

*BAY*, J. Although the original payee of a negotiable note may restrain its negotiability, yet a subsequent indorser may give it currency and negotiability from *him*, and then the negotiable quality of it recommences; for every indorsement is in nature of a new bill, and the indorser may make it negotiable or not, as he pleases. *Bay v. Fraser*, in this court; and also *Salk*. 133.

With regard to the second point, it does not appear at what time this note was negotiated to the plaintiff, whether before or after the 18th *August*, 1788; besides, it may have been in full for other transactions, of which this note formed no part. It would be dangerous, indeed, were the court to suffer a loose receipt of this kind, in which the note was not mentioned, to affect its credit or negotiability.

1791.  
  
 Holmes  
 v.  
 Hooper.

Verdict for plaintiff.

*Hunt* gave notice of a motion he intended to make for a new trial, but afterwards acquiesced in the opinion of the court, and never brought it forward.

HUNT *against* LEWIS.

*Spring Cir-  
 cuit, Camden  
 District.*

CASE to recover back money paid for land, for which the defendant had no titles when sold, as alleged by plaintiff. In *December*, 1787, plaintiff and defendant entered into an agreement for the sale and purchase of a tract of land on the *Waterce* river, by which the defendant engaged to make titles to the land in question, and to warrant it against all the world, except Mr. *Michie* and his heirs; and the plaintiff, on his part, agreed to pay the consideration money. The plaintiff, agreeable to contract, paid the purchase-money, thirty guineas; but soon after discovered (as he alleged) that the land belonged to another person, and that *Lewis* had no right whatever to it. This was, therefore, an action to recover back the sum of thirty guineas, with interest. The plaintiff proved the agreement, and payment of the money to *Lewis*; and on calling a witness to prove (as he

No evidence to be admitted to shew defect of title to lands, except a verdict in an action of ejectment, unless on a covenant that seller was lawfully seised.

1791.

  
Hunt  
• v.  
Lewis.

stated) that *Lewis* had no right to the land he sold him, the testimony was objected to by

*Ford*, as having a tendency, *collaterally*, to try title to a *freehold*, which could be regularly done only in an action of ejectment or trespass.

BAY, J. who presided, declared, that this kind of evidence was inadmissible, unless there had been an *express covenant* on the part of *Lewis*, that he was at *the time of sale* the *lawful* owner ; in which case, a defect of title might be given in evidence. But, in the present instance, the covenant was, that he, *Lewis*, would *warrant* and defend it against *all others*, but Mr. *Michie* and his heirs ; under which latter covenant no cause of action accrues until a *recovery over* and *eviction* by some other person, having a title paramount. Besides, the 3d clause of the limitation act, passed in 1712, expressly declares, that the judges shall allow no other claim to lands but by action at law. Indeed, the party himself seems to have been aware of *Michie's* claim, and until some other person appeared and maintained his title by due course of law, the plaintiff, in the present case, could have no cause of action.

Let the plaintiff be nonsuited.

*N. B.* The principles of the above case have been since overruled at the constitutional court of appeals, on the ground of a failure of consideration which the defendant may give in evidence, before an eviction, either by parol testimony, or by elder grants or deeds, &c. &c.



1791.

The STATE against GEE.

Spring Circuit, Georgetown District.

THE prisoner, *Gee*, was indicted, under the negro act, for the murder of a negro boy, named *Sawney*, the property of *Abraham Cohen*, by shooting with a gun loaded with shot. The jury, after the clearest evidence for the prosecution, brought him in guilty of *wilful* murder; and being unable to pay the fine of 700*l.* currency, imposed by the clause of that law, the court sentenced him, agreeably to the terms of the act, to seven years' imprisonment, and to be kept at hard labour during that time.

On the adjournment day of the sessions, the prisoner was brought up, and a motion made by

*Falconer*, to admit him to prison-bounds, preparatory to his taking the benefit of the insolvent debtor's act; and for that purpose cited the first clause of the act, passed in 1788, for establishing the bounds of prisons and gaols, &c. which enacts, that all prisoners, confined on *mesne* process in any civil action, shall, on complying with the terms of that act, be entitled to the rules, limits and bounds, therein contained. He next cited the 6th clause of the act, to this effect: That if any person confined in gaol, on *mesne* process or execution, shall deliver up his estate and effects, as therein mentioned, he shall be entitled to the benefit of the insolvent debtor's act. He then quoted the latter part of the first clause of the act, passed in 1787, for "recovering fines and forfeited recognisances;" which, after prescribing the mode in which they shall be recovered, enacts, that if the party, forfeiting such recognisances, hath no property, on which a levy can be made to the amount, he shall be committed to gaol on a *capias ad satisfaciendum*, until the forfeiture, costs, and charges are paid; entitled, however, to the privilege of insolvent debtors. This, he therefore contended, was such a privilege as the prisoner, in the present instance, was entitled to; and if entitled to it, he was equally, in the first instance, entitled to prison-bounds, until

No person is entitled to the privilege of the prison-bounds, who is not entitled to the benefit of the insolvent debtor's act. A person, therefore, who is convicted of killing a negro, and committed till he pays his fine, is not entitled to the benefit of insolvent debtor's act; consequently, not entitled to the privilege of the prison-bounds.

1791.

  
 The State  
 v.  
 Gee.

he could make the necessary arrangements required by the insolvent debtor's law.

*Pinckney* and *Ford*, for the prosecution, argued, that the prosecutor had one-half of the 700*l.* currency, and, until he was satisfied, the prisoner could not be released on that ground. That imprisonment and hard labour were inflicted on him as punishments for the atrocity of the offence, which had deserved death. That the frequency of the offence was owing, in a great measure, to the nature of the punishment, which was only a pecuniary fine where the party was able to pay, and imprisonment and hard labour where he was not able ; and that, therefore, the law, which was a penal one, ought to have a rigid construction. They also argued, that none of the acts or clauses of the acts, quoted by the prisoner's counsel, applied in the present case, for that the law, establishing prison-bounds, &c. passed in 1788, related only to prisoners confined in civil cases, on *mesne* process, or executions only, and not to cases where fines were imposed for offences, or imprisonment inflicted as the punishment. That the insolvent debtor's law, in like manner, was only extended to persons in gaol for debt, on *mesne* process or execution, and such as were desirous of surrendering up all their estates for the benefit of their creditors, and particularly excluded persons confined for wilful *mayhem*, or wilful and malicious trespass, from the benefit of that law ; and that the law for recovering the forfeited recognisances, was particularly confined to recognisances before magistrates, agreeable to the act, and to no other kind of forfeiture whatever ; and that the benefit of the insolvent debtor's law, mentioned in the latter part of the first clause of that act, could only be extended to persons confined in gaols on *ca. sa.* in pursuance of that act only. That there was a difference between a penalty and a fine : the first was fixed by law, and the other discretionary in the court ; and that this was a penalty, and not a fine, and did not therefore come under the act.

BAY, J. No person is entitled to the benefit of the prison-bounds, who is not entitled to the benefit of the insolvent debtor's act. This is agreeable to the very letter and spirit of all the acts which have been quoted. The insolvent debtor's law is penned with great caution, and appears, from the preamble, to be intended only for the benefit of those who, by accident, losses, or other misfortunes, are rendered incapable of paying their debts, and by that means had become objects of compassion. But the 8th clause expressly excludes, from the privilege of that act, all those against whom damages have been recovered for wilful *mayhem*, or wilful and malicious trespass, or for damages done to a freehold, &c. and, also, all those who have lost money to a certain amount by gambling practices, &c. There is no mention of criminal prosecutions, or persons convicted of crimes and misdemeanors, in this act. They therefore depend upon the principles of common law, unless otherwise altered by some statute. But, surely, if persons sued and impleaded in civil actions, where damages are recovered in cases of *mayhem*, wilful and malicious trespass, or the like, are excluded expressly, there cannot be room for extending the indulgence, by implication or construction, to those fined and imprisoned in consequence of criminal prosecutions. Besides, it is clear from the very words of the law, for ascertaining prison-bounds, &c. that it is extended to persons confined on *mesne* process, or execution only, therefore excludes every other idea ; and the proviso, in the law for recovering forfeited recognisances, particularly relates to those species of forfeiture only, and to those who are imprisoned in pursuance of the terms of that law, and does not by any means extend to the present case. Therefore,

Let the prisoner be remanded.

1791.

  
The State  
v.  
Gee.

1791.

## The STATE against BLYTH.

UPON an indictment found in *April* sessions, at *Georgetown*, against the defendant, for assaulting Mr. *Maddan*, attorney at law.

*Pinckney* stated, that the prosecutor had commenced his civil action in the court of common pleas, for damages for the same assault, which he conceived oppressive and contrary to the rules and practice of the court ; and therefore moved, before the jury were charged, that the prosecutor, *Maddan*, should make his election of proceeding either in this criminal method upon the indictment, or in the civil action which he had actually commenced ; and that he should not be permitted to proceed both ways at the same time, for the same cause of action.

In support of the motion he quoted the case of *Muller v. Smith*, tried in *Charleston*, where the prosecutor was obliged to make his election, and proceeded *criminaliter*. *Martin v. Santee Club*, tried at *Georgetown*, where prosecutor dropped the prosecution upon indictment, and relied upon his civil action for damages in the common pleas. Also, *Fielding's case*, 2 *Burr.* 719, 20. where the whole court were of opinion that the prosecutor ought to make his election directly, for that this was the constant rule ; and although, in that case, it was a motion for an information against a justice of the peace, for acting illegally, the judges said it made no difference ; for if, said they, the prosecutor had proceeded in the ordinary method, by indictment, (as in the present case,) and if such indictment had been actually found, yet the attorney-general would, upon application made to him, have granted a *nolle prosequi* upon such indictment, in case it appeared to him that the prosecutor was determined to carry on a civil action at the same time.

For the prosecution, the counsel cited 3 *Black. Com.* 121. and 4 *Black.* 156. to shew the *general* law, that in case of

assaults, the party might proceed both ways at the same time. But

1791.

The State

v.

Byth.

*Per Curiam.* The practice of the court at this day is very different ; and although the party may commence his civil action and prosecution at the same time ; yet, if he will persist in carrying them on both at the same time, the *Attorney-General* will and ought to enter a *nolle prosequi* upon the indictment, unless he makes his election ; because it would be unjust to lend the aid of the court to the prosecutor, for the purposes of oppression and revenge, when he was about appealing at the same time to a jury of his country for damages for the same injury ; and because, as it is very properly laid down in *Fielding's* case, it would be giving the prosecutor a very unfair and unreasonable advantage over the defendant, by discovering the nature of the evidence he was able to bring forward in the civil action, before it was tried. And that this point had been ruled in the cases quoted by the defendant's counsel, and sundry others, so that it is not now to be questioned.

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The STATE *against* LOVE.

April Ses-  
sions, Camden  
District.

IN this case it appeared that the prisoner, *Love*, concealed her bastard child after its death ; but there was also some evidence given, which induced the jury to be of opinion the child *was still-born*, and they accordingly acquitted her.

*April Sessions, Georgetown District.*

**The STATE against FRINK.**

Where a prisoner is convicted of manslaughter, and recommended to mercy by the jury, the court will, on circuit, postpone the sentence till the first day of the ensuing term, in order to give him an opportunity of applying to the governor for a pardon; and, in the mean time, admit him to bail for his appearance.

IN this case, the prisoner, *Frink*, was convicted of manslaughter: but on account of some favourable circumstances which appeared on the trial, the jury thought proper to recommend him to mercy.

On the last day of the sessions, he was brought up to receive sentence of burning in the hand, which had been usually inflicted *instantly* in open court. As the jury, however, had recommended him as a fit object for the clemency of the executive, and this being the last day of the court, and there being no possibility of the prisoner's procuring a pardon before the final adjournment of the sessions, from the circumstance of the governor being in *Charleston*,

BAY, J. who presided, sentenced him to be burnt in the hand on the first day of the ensuing *November* sessions. The case being a new and singular one, he thought proper to consult

WATIES, J. who was then in *Georgetown*, on the occasion, and who readily concurred with him, that there was no other way left for the court to give the prisoner an opportunity of availing himself of the benefit of the recommendation of the jury, but by thus postponing the execution of the sentence till the following court. Mr. Justice WATIES also mentioned, that there had been a similar postponement, in a case of the same kind, on the southern circuit, but he did not then recollect the prisoner's name.

Prisoner was admitted to bail for his appearance on the first day of the ensuing *November* sessions.

See 2 Hawk.  
106. also 2  
Hale, P. C.  
101, 102. 129.  
131.

WILKINSON and others, Trustees of NEAL, against  
CAMPBELL.

May Term.

ASSUMPSIT for goods sold by defendant as an auctioneer, on account of plaintiffs. *Wilkinson, Teasdale*, and another, were trustees for *Neal*, and ordered the defendant, as an auctioneer, to dispose of his goods and effects on a credit of six months, *taking security from the purchasers for the amount* of their purchases. *Campbell* sold the goods, amounting to 206*l.* 12*s.* 9*d.* and took bonds with security for a part, and the rest he delivered to the different purchasers, *without security*. When he closed his accounts with the agent of the trustees, *Mr. Peppin*, he paid about 80*l.* in cash, offered bonds with securities for about 40*l.* more, and the residue in open accounts against the purchasers; which *Peppin*, on behalf of the trustees, refused to receive. The question, therefore, was, whether, under these circumstances, the defendant was liable or not?

Where an auctioneer or factor deviates from the instructions of the principal, he is responsible in damages.

RUTLEDGE, Ch. J. The trust between principal and factor, is a great and important one, especially in mercantile transactions; and were this court to permit factors to deviate from the instructions of their employers, there could be no such thing as confidence between them. Here there has been a clear and unwarrantable deviation, in the defendant's not taking the securities directed; and also, in refusing to deliver *Peppin*, the agent for the plaintiffs, the bonds he had taken with securities, unless he, *Peppin*, would receive the open accounts also, in full discharge of the transaction.

Justices GRIMKE and BAY concurred in opinion; and the jury found for plaintiffs the amount of both the bonds and open accounts.

*May Term.**PHÆLON against M'BRIDE.*

A negro boy  
slave bound  
out as an ap-  
prentice to a  
hair-dresser,  
not distraina-  
ble for rent  
due by the  
master to  
whom he is  
bound.

**REPLEVIN.** A negro boy was bound as an apprentice to *M'Bride*, to learn the trade of a hair-dresser. He was seized, under a warrant of distress, for rent, and replevied. The distress for rent was avowed; and the single point was, whether a negro apprentice, bound out to learn a trade, was liable to be distrained for rent due by the master to whom he was bound.

*Smith*, for the avowant, contended, that on the general principles of law, all goods and chattels found on the premises, were liable for rent in arrear. That negroes are considered by the laws and customs of the country, as goods and chattels; and the boy in question, being found on the premises, he was liable to the distress.

*Pinckney*, for plaintiff in replevin, insisted, that the negro in question was not liable to distress for rent. That negroes of third persons ought to be exempt from distress. That in this case, they might be considered as goods in the way of trade; and even in *England*, goods in the way of trade are not liable to distress. That hair-dressers could not carry on their trade without boys or apprentices; and who would bind out their negro boys if they were liable to be seized for rent? No one. The doctrine of distress was a hard one, taken from old feudal principles, not applicable to the circumstances of this country. All the modern cases had liberalized the doctrine of distress exceedingly. He quoted the case of *Himely v. Wyatt & Richardson*, (in this court,) where goods sent to vendue were held not liable for rent.

*Court* unanimously of opinion, that the negro boy was not liable to be distrained; upon the principle that goods in the way of trade are exempted; and also, because indentures of apprenticeship are not, even in *England*, liable to distress. The case of *Himely v. Wyatt, &c.* was adjudged



upon wise and legal principles, and is much in point. In the opinion of the court, it would be hard and unreasonable, under those circumstances, to make the property of a third person liable for the default of a tenant; and that wherever there was a case so much against natural justice, the court would uniformly lean in favour of the just and reasonable side.

1791.

Phaelon  
v.  
M'Bride.

Verdict for plaintiff in replevin.

EDEN *against* LEGARE.

May Term.

SLANDER, for calling the plaintiff a mulatto. The defendant in this case attempted to *justify*, but failed in his justification. He then contended the words *were not in themselves actionable*; and if not actionable, that he was not subject to damages, unless a special loss had been proved. But the

Calling a man  
a mulatto, is  
actionable.

Court resolved, that the words in themselves were, in this country, *actionable*, and

RUTLEDGE, Ch. J. mentioned several cases where it had been formerly held that an action lay for them; because, if true, the party would be deprived of all civil rights, and moreover, would be liable to be tried in all cases, under the negro act, without the privilege of a trial by jury. Any words, therefore, which tended to subject a citizen to such disabilities, were actionable.

As the plaintiff did not go for vindictive damages, but only to vindicate himself from slander,

Jury found 3*l*. damages, and costs.

CHIEF JUSTICE, BURKE, and BAY, present.

*May Term.**The STATE against WELCH.*

No person, under the negro act, shall be permitted to exculpate himself by his own oath, for killing a negro, but the master, overseer, or some person having the immediate charge of such negro.

IN *September* sessions, an indictment was preferred against the prisoner, for murdering a negro slave, the property of Mr. *Radcliffe*. On the trial, it appeared that the prisoner had taken up the negro on some pretext or other, and afterwards carried him on board of a schooner he then commanded ; where, either in attempting to tie him, or secure him from going off, he threw a lead-line round the negro's neck, and strangled him.

After the evidence for the prosecution was closed,

*Pinckney*, counsel for the prisoner, stated that there was no person present when the affair happened but the parties themselves, and offered the prisoner's exculpatory oath under the negro act, which enacts, " That if any slave shall  
 " suffer in life or limb, when no white person is present, the  
 " owner or other person who shall have the care of, and in  
 " whose possession or power such slave shall be, deemed  
 " guilty of such offence, and shall be proceeded against accordingly, without further proof ; unless such owner or  
 " other person do make the contrary appear by evidence, or  
 " exculpate himself by his oath," &c. *Sed per*

*Tot. Curiam.* This oath in exculpation is only to be permitted or allowed to *masters, overseers, or others*, having the *charge* or *care* of negroes ; and not to *those* who have not immediately the direction of them.

The prisoner was found guilty of manslaughter ; and the court sentenced him to pay a fine of 50*l.* sterling, and stand committed till paid.

1791.

BREEN *against* INGRAM.

May Term.

CASE on attachment. This suit was brought upon an agreement from *William M<sup>c</sup>Intosh*, of *Georgia*, dated 11th *December*, 1785, to *Thomas Washington*, by which he engaged to deliver *Washington*, or order, *Richard Call's* bond for 315*l.* sterling. This agreement was afterwards negotiated to the plaintiff *Breen*, who attached the property of *M<sup>c</sup>Intosh* in the defendant *Ingram's* hands, to pay this 315*l.* But resolved *per*

No obligation to do a collateral thing, although mentioned to be done to order, is negotiable; as the statute of *Anne* makes only notes for money negotiable.

*Tot. Curiam.* This is only a covenant to do a collateral act, although said to be delivered *to order*, and not a negotiable note under the statute of *Anne*, which makes notes payable for money only, negotiable. 2 *Burr.* 764. *Esp.* 31. 1 *Str.* 609. 2 *Str.* 1151. 1273.



HAMILTON and LAMBRIGHT, Trustees for HOLMAN, *May Term.*  
*against* GREENWOOD and others.

SPECIAL action on the case, to try the property of a negro wench *Minah*, and her children, settled on Mrs. *Holman* by her husband, at a time when he was supposed to have been considerably in debt. Mr. *Holman*, the husband, in *October*, 1775, in order to make a provision for his wife, settled the negro in question and four others, on her and to her heirs for ever, &c. in the usual form. The deed was recorded in 1776. At the time this settlement was made, it appeared that *Holman* had 12 or 15 negroes, a stock of cattle, and household furniture, &c. to a considerable amount. That there *had* been a difference be-

Every voluntary deed of settlement, made by a husband on his wife, not fraudulent against creditors, though the husband was in debt at the time the settlement was made. Fraud or not fraud, proper for the jury, under all the circumstances.

1791.

Hamilton and  
Lambright  
v.  
Greenwood  
and others.

tween them, and in order to reconcile matters, the deed in question was made.

On the part of the defendant it came out, that *Holman* afterwards (as his wife and himself did not live on the best of terms) made a mortgage, dated 1st of *April*, 1777, of this negro wench and some others, to defendants, in order to secure a debt he owed them ; which mortgage was regularly recorded in *May*, 1777. It was also alleged and proved, that this debt due to the defendants, was contracted previous to the deed of settlement on Mrs. *Holman*. So that the question was

Whether the deed of settlement, so made in favour of Mrs. *Holman*, was void against the defendants, who were creditors previous to the date of the settlement.

*Ward*, for defendants, relied on the statute of 13th *Eliz.* relating to fraudulent conveyances. *Twine's* case, 3 *Co.* 80. and 1 *Atk.* 13. and contended that the deed was void as to the defendants ; and more especially, as the debt was *bona fide* contracted previous to the date of the deed.

*Read, contra*, argued, that the deed could not be void, unless it had been done *for the express purpose of defrauding creditors* ; and there was no evidence of any such intent. That *Holman* had other property at the time of making this provision for his wife, and much more than would have paid off the defendants, had they pressed for their debt. That a deed made for the advancement of a man's family, was not fraudulent under 13th *Eliz.* merely because he happened to owe money at the time of making the deed. That the prospects of *Holman* then might well have warranted it, though adversity might have afterwards overtaken him : and in fact, it appeared that he had made several imprudent bargains afterwards, which had reduced him to insolvency before his death.

*By the Court*, unanimously. Fraud or not fraud, under the whole of the circumstances, is a matter very proper for the consideration of a jury. There is no point clearer, than where a deed is made for the purpose of defrauding

creditors, whatever the pretence may be, wherever such intent can be traced out, it is fraudulent, and ought to be set aside. But to say that no voluntary deed, made for the support and advancement of a part of a man's family, is good, because a man happened to be embarrassed at the time such deed was made, would be carrying the matter much further than the principles of law or justice would warrant. In the present case, the deed appears evidently to have been made for the support of the wife, especially as there had been differences between them. There is no secret trust in it ; or that the property should ever revert to *Holman*. It is absolute and unconditional, and appears to have been recorded soon after its execution, which was notice to all the world. The statute of *Elizabeth* does not go to voluntary conveyances, merely because they are *voluntary* ; but to such as are *fraudulent*. A *fair, voluntary* conveyance may be good against creditors, notwithstanding its being *voluntary*. The circumstance of a man's being *in debt* at the *time* of making such a deed, may be an *argument of fraud* ; but then the grand question in every such case is, whether the act done is a *bona fide* transaction, or whether it is a *trick to defraud* creditors ? If there is any trust for the use of the grantor, it is fraudulent ; *Cowp.* 434, 5. but in this case there is none. It is also laid down by Lord *Mansfield*, *Cowp.* 436. that a settlement was not *fraudulent*, because there *were creditors* at the *time* it was made, if the transaction was a *fair* one. He also lays it down in *Cowp.* 710, 11. that a custom has prevailed, and leaned extremely to construe *voluntary* settlements *fraudulent* against creditors ; but if the *circumstances* of the transaction shew that *it was not fraudulent at the time*, it is *not* within the *statutes*, though *no money* was paid.

Jury found for the plaintiffs to the amount of the value of the wench and children.

1791.

Hamilton and  
Lambrightv.  
Greenwood  
and others.

May term.

The Executors of Fowl against TODD.

The depreciation law of South-Carolina does not affect contracts made in other countries, unless there is a special agreement to run the risk of such depreciation.

A good ground for not presenting bills for payment.

Interest shall be allowed only from time of demanding payment, if the drawer did not know of the depreciation.

ASSUMPSIT on two protested bills of exchange, drawn by the defendant at the island of *Bermuda*, on his brother *Richard Todd*, in *South-Carolina*; one dated in *October*, 1778, for 350*l.* currency, and the other in *October*, 1779, for 2,400*l.* currency.

The value of *South-Carolina* currency in *Bermuda*, was well known to be seven for one sterling; but when the bills were sent on for payment, the money had greatly depreciated in *Carolina*, so that the holder would not present them for payment; and in fact, never did, as the money eventually perished. This action was, therefore, brought against the drawee for the amount of these bills and interest. On the trial of the cause before a special jury, several grounds of defence were taken by the defendant. First, that the defendant was not liable, as the bills had never been tendered for acceptance or payment, and that the depreciation then prevailing, was not a sufficient ground to excuse the holder for keeping back the bills. Secondly, that if the defendant was liable, he was only liable for the value in depreciated money at the time. And thirdly, that if interest was to be allowed, it should only be given on the value of such depreciated money, from the time of demand of payment.

On hearing of the arguments,

RUTLEDGE, Ch. J. delivered the opinion of the court as follows: First, that the great depreciation of money in *Carolina* at that time, having been reduced down to thirty for one, *well excused* the holder from presenting it for payment at that depreciated rate, especially as it was a tender in all cases whatever.

Secondly. As the contract was made in *Bermuda*, with a view to the value of *South-Carolina* money as it stood before the depreciation, at seven for one, it ought, in good faith and conscience, to be paid at that rate. That the de-

preciation law *did not extend to contracts made out of the state*, unless a special agreement to the contrary.

Thirdly. With respect to the interest : if the drawer *knew of the depreciation* at the time he drew the bills, and concealed the circumstance, it was a species of fraud, and he ought to be chargeable with interest from the time of drawing the bills. But if not, (of which the jury was to judge,) then he is only liable for interest from the time of demanding payment.

Jury found the bills at seven for one, with interest from the time of demanding payment.

CHIEF JUSTICE, BURKE, and BAY, present.

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SCARBOROUGH and COOK *against* HARRIS.

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INDORSEES against the indorser of a bill of exchange.  
Cause tried before a special jury.

On the 5th of *August*, 1783, *John Banks* drew the bill in question, on a *Mr. Cunningham* in *Glasgow*, which was indorsed by the defendant to give it credit, and negotiated by *Banks* to the plaintiffs. On the 18th of *November* following, it was presented to *Cunningham*, and noted for non-acceptance for *want of effects*; of which the plaintiffs gave due notice to the drawer, *Banks*, but kept it back from the defendant, the indorser, at the particular desire of *Banks*, whose credit at that time was tottering. On the 26th of *January*, 1784, *Banks*, in order to satisfy plaintiffs, gave a *new* bill for the amount of the former bill, with interest and damages, on his brother in *Virginia*, which was returned under protest. In the mean time, the first bill from *Glasgow*, came out protested for non-payment.

Wherever a new credit or time for payment, is given by the holder of a bill to the drawer, the holder takes it upon himself, and the indorser is discharged.

In all cases whatever, the holder must give a reasonable notice to the indorser.

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*Banks* soon after became insolvent, and went off to *North-Carolina*, where he died. And on the 20th of *April*, 1784, the plaintiffs gave notice to defendant, and demanded payment from him, which was refused.

For the defendant, two grounds were taken: 1st. That there was not immediate notice given him as indorser, of the non-acceptance, which the *law of merchants* requires; not being apprized of it till *April*, 1784, after *Banks* became insolvent. 2d. That there was a new credit given, by taking a new bill, and giving *Banks*, the drawer, time for payment.

*Per tot. Curiam.* 1. Although it may not be necessary, in some cases, to give drawer notice of protest, as where drawer had no effects in drawee's hands, *Doug.* 55. yet this rule will in no case apply to an indorser. 5 *Burr.* 2607. For in all cases whatever, the holder of a bill must give reasonable notice to the indorser, that is, by first post or convenient opportunity, which is partly a matter of fact for jury, what is reasonable or not. *Doug.* 499.

2. Wherever a new credit is given, the party holding, takes it upon himself; and in no case where the holder gives time for payment to the maker, is the indorser liable. 1 *Term Rep.* 167. 714. 1 *Well.* 48.

Verdict for defendant.



OSBORNE *against* HUGER.*May Term.*

THIS was a special action on the case. The first count in the declaration stated, that in and by a late act of the legislature, ratified on the 19th of *February*, 1791, being "An act to amend the several acts for establishing and regulating the circuit courts throughout this state ;" it was, among other things, enacted, "That the sheriff of each of the said districts, shall be obliged, at the expiration of his office, to turn over to the succeeding sheriff, all executions whereon he hath not made actual sale of the property levied by virtue of such executions, to the amount of the demand of the plaintiffs in such suits." That the defendant, at and after the time of passing the said act, until the day of *March* following, was sheriff of the district of *Charleston*, at which day his office expired ; that immediately afterwards, the plaintiff became and was sheriff of the said district, by virtue of an election thereto by the legislature, on the 19th of *February*, 1791 ; that at the same time, the defendant had in his hands, a certain execution or *fiery facias* (in the said declaration named) returnable to *January* return, 1791, on which, though the defendant had made a levy, he had made no actual sale of the property ; and that by force of the said act of assembly, it accrued to the plaintiff, as successor in office, to have, possess, and execute the said execution : nevertheless, the defendant well knowing the premises, but intending to hinder and embarrass the plaintiff from, and in the execution of his office, and to deprive him of the fees and emoluments appertaining thereto, did not, although often requested, turn over the said execution, but refused, and still did refuse so to do.

Second count charged the defendant, in the same way, with having one other execution in his hands, whereon he had made a levy, but no actual sale ; and by pretext whereof, defendant, after the expiration of his office, proceeded to

The act of 1771, obliging sheriffs to turn over their books, writs, executions, and papers, &c. &c. to their successors in office, ought to have a prospective, not a retrospective operation ; consequently, it does not extend to any of the old sheriffs in office, when that act passed.

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sell the property, and, upon that sale, received for fees and commissions 25% which said sum of 25% by reason of the aforesaid act of the legislature, the defendant became liable to account for and pay to the plaintiff; and being so liable, that he assumed upon himself, and promised to pay, when he should be thereunto afterwards requested, &c. (in the usual form.)

Third count differed in no respect from the second, only that the defendant (instead of selling the property levied) had, after his office expired, received from the defendant in the cause, (therein named,) the debt and costs due upon the execution, and with it 25% for sheriff's fees and commissions; for which, being in like manner liable, he assumed, &c.

To the declaration the defendant demurred generally. The state of the case under it, was, shortly, that the defendant, *Huger*, was the old sheriff, in office before the act passed, and that he was elected for two years. That those two years would not elapse till *March*, 1791. That the plaintiff, *Osborne*, was new sheriff, and the questions were,

1st. Whether the clause of the act aforesaid was to operate so as to oblige the old sheriff to turn over to his successor, all executions on which he had not made sale of the property, even though he had made levy thereupon?

2dly. Whether, if the executions were so to be turned over, the fees of office were to pass over with them?

*Read*, *Holmes* and *Ford*, contended, that the sixth clause of the act was express and unqualified, and without any latitude of construction, easily embraced this case. It was as follows: "That the sheriff of each of the said districts  
" shall be obliged, at the expiration of his office, to turn  
" over to the succeeding sheriff, all such writs and process  
" as shall remain in his hands unexecuted, in the manner  
" prescribed by the act for establishing courts, building gaols,  
" and appointing sheriffs and other officers, for the more  
" convenient administration of justice in this (then) province,  
" passed 29th July, 1769; and also all executions whereon

“ he had not made actual sale of the property, levied by virtue of such executions, to the amount of the demands of the plaintiffs in such suits.” To bring the late sheriffs within this clause, it was incumbent on them to shew that this act took effect and operation before the expiration of the offices. In order to this, they contended, that where no time is limited in the body of an act for its commencement, there, by law, it takes its operation from the first day of the session of the legislature. To prove this, they cited 1 *Roll. Abr.* 465. 4 *Inst.* 25. *Hob.* 309. 4 *Bac. Abr.* 636. pl. 1, 2, 3. 4 *Com. Dig.* 375. k. 1.

But it may be said that *there is* a time mentioned in the second clause of this act, viz. “ From and after the next sitting of the courts through the state.” They admitted, that if this were true, it would destroy the construction, because the offices of all the sheriffs expired before the court sat. But they contended that these words were not intended, nor could they be construed into a general limitation of the whole act, but had an evident relation only to the *court days* and *return days* through the state, which were all altered by that clause, and from and after the termination of the next courts, was the period fixed for such new arrangement of the court days and return days to take effect. The operation of these regulations, therefore, ended with the third clause, which also declares the boundaries of the districts, and erects two new districts. This construction they further inferred from the nature of the 4th clause, which declares who shall be the judges of the courts. That it created a *chief* justice and one *puisne* judge, both of whom were elected by the same legislature, and who, instead of postponing the exercise of their offices till after the session of the next courts, actually held some of those courts themselves, tried and convicted capital felons, who have since been executed, and sat in trial upon several important civil causes. Yet, if that clause could have so extensive an operation, those trials and those convictions were, and necessarily must have been, *coram non judice*. Thus, they con-

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tended, that the very existence and legality of those courts themselves depended upon the construction they put, and was a tacit declaration, by the judges, that the limitation mentioned in the second clause had no more than a limited effect in some particular parts of the act. It was further contended, however, that if the act took effect only from the time of its ratification, (which happened, it seems, to have been on the same day on which the election of sheriffs and other officers took place,) still, the old sheriffs would be within it, because they were elected under the former constitution of this state, which declared, that the "sheriffs" "should be elected and commissioned for two years;" and that the two years did not expire until some time in *March* next after the passing of the act.

The counsel next endeavoured to obviate an objection which arose out of the twelfth clause of the same act. It was as follows: "That this act shall not extend to any" "actions which shall be commenced before the 18th day of" "*November* next; but all such actions and suits may be pro-" "ceeded in and determined in the same manner as if this" "act had never been passed." This clause, they said, might be obviated in three ways, each of which was equally conclusive. 1. That from considering the place, and the relation it stands in to all the rest of the act, the words, though very general, must evidently be taken as a proviso. By referring to the immediately preceding clause, it is found, that provision is made for building gaols and court-houses, in the new districts which had been erected and defined in the former parts of the act. These new districts had been carved out of some of the old ones. It naturally occurred to the legislature, that time must be given for these court-houses and gaols to be built, and that, until they could be built, no courts could be holden there, and, of course, no actions commenced. They therefore gave one year's time for this to be done, and ordained that the courts should not commence, in these new districts, until the year 1792. What should be done in the mean time? Could

suits be brought in these districts, issuing from and returnable to the courts of the districts of *Ninety-six* and *Camden*, from whence they were carved? No; because these new districts were from thenceforth independent. There must have been a failure of justice in those new districts for one year, had not the legislature made provision against so serious a calamity. This they did by the clause in question, which meant to allow actions to be brought in these new districts, returnable to the old ones, as heretofore, until *November* court, 1791; immediately after which period, the court-houses, &c. being supposed to be built, and the juries being expressly ordered to be drawn, the new district opens and the provision expires. This construction evidently embraces the intention of the legislature, and falls under that rule, "that in the construction of one part of a statute, every other part ought to be taken into consideration." 4 *Bac. Abr.* 645. pl. 7, 8, 9. 14.

2. But admitting the clause to have an operation as general as the words of it, still, it can operate only upon "actions which *shall* be commenced before the 18th day of *November* next." It regards only the future, and not the past; and being merely prospective, can have no operation upon actions which not only had been commenced, but in which executions had actually been issued before the act passed.

3. That this clause speaks of "*actions*" only, and not of executions. An execution is not an action. When a statute uses terms, the import whereof is known at common law, they are to receive that sense and interpretation which the common law gives them. 4 *Bac. Abr.* 647. pl. 29, 30. That in common law parlance, an execution is no action. *Co. Litt.* 289. 4 *Bac. Abr.* 601. pl. 7. Thus then the 12th clause no more than the second, infringed the construction for which the plaintiff contended, and it left the act at full freedom to operate upon the case before the court.

They then proceeded to obviate some objections which they foresaw would be made by the defendant's counsel; and first, that if the emoluments of execution lodged with,

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and levied by the old sheriffs, before their offices expired, were thus to be carried into the pockets of the new sheriffs, by force of a law enacted just about the time of these offices expiring, and after all these rights had accrued under the old laws—this would be an *ex post facto law*, and therefore unconstitutional, as well by the federal constitution, as by the existing constitution of this state. The plaintiff's counsel answered, that this term *ex post facto law*, had come much into fashion since the formation of the federal government; was currently used by all orders of people, and applied whenever they perceived a law which in any degree infringed any of their present interests, and even, by some professional men, taken in a latitude of construction which, if admitted, would repress the power of legislating hereafter by general laws. Nor will the obvious intent of that instrument warrant such construction. Here the counsel went into a discussion of this term; and endeavoured to prove that in the contemplation of the constitution, *ex post facto* laws extend only to crimes, and not to civil cases. The first time it occurs in the federal constitution, it stands as an obligatory precept upon the general government. "No bill of attainder, or *ex post facto* law shall be passed." A bill of attainder is always a criminal proceeding, and the other phrase or term is coupled with it as a more general provision, and intended to apply to cases where the other did not extend. Every bill of attainder is an *ex post facto* law, but the converse is not true. Had it therefore stopped at the first, congress could not have been precluded from inflicting the other *ex post facto* punishments. They might have fined, imprisoned, &c. Therefore, to guard the citizen effectually against that most formidable, and most odious of all kinds of oppression, the inflicting punishments for an act, which, when committed, was no crime, the convention who framed the constitution, added the latter as a *nomen generalissimum*. Standing thus together, they form an ample security to the citizen; and though it might be said, that the latter clause is comprehensive enough to have rendered the former unnecessary; yet, among a people

jealous of their liberties, it was natural to provide by name, against the most dangerous of all laws, (those of attainder,) and especially, considering how mischievous they had been in times past, both in this and other countries. The next time it occurs in the constitution, it stands as a prohibition to the several states: "No state shall (*among many other prohibitions*) pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." From this clause it is demonstrably confined to criminal cases; for, if it should be conceded that it extends to civil cases, it surely cannot extend to them in any other way than by "impairing the obligation, *or frustrating the ends of civil contracts*." But this interference is provided against by other words. Then the convention and the constitution might be accused of tautology in the very same sentence; an accusation which, whether we regard the instrument itself, or the illustrious body of learned men who framed it, is equally unjust. Perhaps, on the contrary, there has never been a human production in which perspicuity and comprehensibility have been so skilfully compressed into a small compass. From hence, therefore, the plaintiff's counsel inferred, that the words "*ex post facto law*," and the words "law impairing the obligation of contracts," standing together as they do, can never be taken to have intended the same thing. In confirmation of their construction they cited 1 *Black. Com.* 45. where he describes an *ex post facto* law, as a law by which, after an action indifferent in itself is committed, the legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who did it. They also cited *The Federalist*, vol. 2. p. 345, 346. where it is expounded in the same way. They further argued, *ab inconvenienti*, (which they contended was in cases of construction, and in all elementary cases, a proper mode of reasoning,) that in the course of ordinary legislation, by general laws, it has always happened, and necessarily must happen, that some laws would operate on some people in the nature of *ex post facto* laws, as far as

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they relate to private transactions between man and man. Whenever a law is altered—whenever it is repealed—if that alteration or repeal operates in favour of any class of citizens, with relation to past transactions, it will most probably derogate from the interests of others, relative to the same transactions. The very nature of the thing supposes it. And yet shall it be said that all laws are absolutely void? By enlarging the interests of *A.* those of *B.* are probably abridged; by suspending a remedy, a right is probably interrupted. Here the counsel instanced in several laws now of force, (alleging that the statute book was full of them,) as

1. The insolvent debtor's act. By this, they said, the original remedy of charging the body of the debtor for antecedent debts, might be considered as *ex post facto* by the release from gaol of defendant, on giving up his effects. And this tallies with what is laid down in 4 *Bac. Abr.* 650. pl. 70.

2. The various suspensions of the statute of limitations. Every debtor, by note or account, had, under the act of limitations, a right to bar his creditor, if not sued within four years; yet this right had been baffled and frustrated for many years past; and two of the suspensions of that act have been made since this state ratified the federal constitution. By these also, many a man will lose his lands, to which, otherwise, under the existing laws of the country, he would have obtained a complete and indefeasible statutory right.

3. The act relative to executors and administrators. This puts bonds and notes upon the same footing,\* to the manifest injury of the former in payment of debts; and yet, before that law passed, and at the time of the respective contracts, bonds were, by law, entitled to priority in

\* It has since been adjudged, that this act has not altered the old law in this respect. *Vide post*, the case of *Harbison v. Giles*; also, the case of *Rippons v. Townsend*.



the settlement of estates. This law has also been passed since the federal constitution.

4. The instalment act, which compels the creditor to wait for five years, before he can enforce the full payment of a debt due before the law passed. This also was passed before the ratification of the federal government by this state. All these laws and regulations, however wise and salutary in themselves, they contended, were inconsistent with that principle of the constitution, (if it extended to civil cases,) and those of them which have been passed since the federal constitution, and any others that may be passed, unavoidably and pressing as the exigencies of them may be, must, on that ground, be vacated and set aside. Therefore, from the face of the constitution itself, from the force of the authorities cited, and from the absurd extent to which it must be allowed to operate, if admitted at all, they inferred the inadmissibility of such a construction of the constitution, that *ex post facto* laws related to cases of a *civil nature*. Another objection was, that this action goes to the destruction of vested rights. They said, that even if the rights of the sheriff as to executions, were to be called *vested rights*, an act of assembly has power to divest those rights. This they inferred from the four interferences which had already been mentioned, and which could not be denied to be legal; for, as it has already been contended, they could not be called *ex post facto* laws. Innumerable instances of a like kind, they said, might easily be brought up; but they denied that the right to finish the executions, make sale of the property, &c. were vested in the sheriff. They here dwelt upon this part, under the three stages which every execution was supposed to pass through in the office—as 1. The entry in the office. 2. The levy. 3. The sale of the property. When, said they, does the right vest? Not upon the first stage; for the plaintiff may lodge the execution only to bind, and order the sheriff to do nothing till he directs it. Not upon the second; for he may order the levy to be made, and wait similar directions. Nay, he may go and settle the debt and receive the money from the

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defendant, and thereby prevent the sheriff from making any sale, and, of course, deprive him of his fees for so doing. The plaintiff may, and often does, give delay and indulgence—even the attorney does it sometimes. The defendant may call at the sheriff's office, or at the attorney's, before levy made, and pay the debt. In all these different ways, and by all these different persons, may executions be superseded. They contended, that a vested right must be also an *exclusive* right; but with what propriety, then, can that be called a vested or an exclusive right, which so many persons have the power to defeat? But if it be not so defeated, then the sheriff proceeds to the third step—to sell. At this period, then, a right does indeed accrue and vest; but what right? A right to have the fees and emoluments for the service performed. This distinction they inferred from the 29th *Eliz.* c. 4. made of force in this state. *Acts of Assem.* 71. That act annexes the sheriff's *per centage* to the completion of the execution. The words are, “and “deliver in execution.” But such a right as this, it was not the object or tendency of the present suit to defeat. In as far as the sheriff had performed the service, they admitted he had a right to the fees; and only contended that the late act had transferred the right, and imposed the duty on the new sheriff, to go on and complete the unfinished executions. Having, as they contended, shewn that the executions, by the express words of the law, must be turned over, they proceeded to argue, that the emoluments for the future execution of them, must pass over also to the new sheriff. That they are the accessory appendages, and must follow their principal. That the law itself declared them to be such, as the words in the act of *Elizabeth*, above cited, are, “for serving and executing,” &c. This, they contended, was also highly reasonable, the law having required the duty at the hands of the new sheriff, can never be presumed to do this, giving the reward to the old sheriff. And, moreover, that the labourer was in all cases worthy of his hire.

*Pringle, Parker, and Harper*, for defendant, argued, that neither the execution on which he had made a levy, nor the fees accrued or to accrue thereon, ought to be turned over to the present sheriff. They said that an execution is an entire thing, and cannot be superseded when once it is begun, but that the sheriff who begins it, not only has a right, but is compellable to proceed to the final close of it. For this they cited *Cro. Eliz.* 440. *Bucker v. Wiseman.* *Cro. Jac.* 73. *Ayre v. Arden.* *Mon.* 757. 1 *Salk.* 322. *Clark v. Withers.* *Barnard.* 81. 6 *Mod.* 290. The act of assembly, passed in 1769, called the circuit court act, enacted in the same words with the former part of the clause of this act now in question ; but it never was held to extend to executions : and the uniform construction, and that which has constantly been acted under, has been, that it extended only to writs of *capias ad respondendum* and the like. This was the law then, and is the law now, as to every past case, though it will not be so in future, by reason of the alteration made by the act in question. It was the law under which the late sheriff received the executions, and which, together with the possession of the executions, gave him a right to the fees and emoluments they might create ; of which he cannot legally, and at any rate, by *implication*, be divested. They further contended, that this was purely a question of construction ; and that, though it might appear, by a clause of the instalment law,\* that the legislature *thought* the unfinished executions were to be turned over, yet it only proves that the legislature mistook what the law was. But a mistake of this kind can never supersede the common law, which can never be altered by *implication*. 2 *Black. Com.* 380. The present, therefore, equally remains a question of construction upon rules and principles. If,

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\* The words were these : " Provided, that if the sheriff who has made the  
" levy as aforesaid, and does not carry the sale of the property into effect,  
" that the half commissions and charges so paid to him as aforesaid, shall not  
" be paid again to any other sheriff ; but so much shall be allowed and  
" passed to the credit of the debtor, on account of the said execution."

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then, this was a question purely of construction, and execution is, as had been shewn, an entire thing, it follows, that the ministerial duty under it is indivisible; and the court must so construe a statute, as to make it consist, if possible, with every other part of the law. If the act impugns the law in this respect, it can never be held to extend to cases which had existence before the law passed. They further contended, that if such construction should be given to this law, as to make it comprehend all the cases that existed at the time of its passing, it would be to give efficacy, nay, to extend, by construction, an *ex post facto* law, and a law impairing the obligations of contracts. This law, they said, would be both within the meaning and the reason of the clause in the constitution which prohibits *ex post facto* laws. Suppose that the other clause, viz. "laws impairing the obligation of contract," had been left out, would it be adjudged that interferences in civil cases were not provided against? Surely not. The instances cited by the plaintiff's counsel, where *ex post facto* laws have been passed, (admitting that they are all such,) only prove that we have done wrong heretofore, and ought to do so no more. Indeed, it was the evident object of this clause of the constitution to prevent it in future. The term "*ex post facto* laws," applies to civil as well as to criminal cases. *Domat.* 75. p. 6. s. 2. *2 Mod.* 310. *Gilmore v. Executors of Shooter.* *2 Raym.* 1350. They imply "a law made after the act." And they contended, moreover, that they are as pernicious when they influence civil, as when criminal cases. That the reasons, therefore, are the same; and as interferences in private contracts, and oppressing one class for the benefit of another, had been a frequent complaint in the *United States* since the late war, they concluded that the convention probably had this description of evils eminently in view. But at any rate, this would be a law impairing the obligation of contracts. Here, they contended that there was an implied contract between the plaintiff and the sheriff, that the former would pay the fees for the service of the execution. To prove this, they cited

*Salk.* 209. *Jayson v. Rash*; where it was held, that debt would lie for the sheriff to recover his fees. *Esp. Dig.* 7, 8. And in 12 *Mod.* 513. it is held, that a gaoler may even detain in custody the body of his prisoner, until his fees are paid. If, then, there subsists such a contract, and a law is made transferring the obligation of payment from the old to the new sheriff, the obligation of contract is clearly frustrated or impaired. Besides, from the very expressions used in the clause, it was easy to collect that the late sheriffs were never intended to be comprehended. "The sheriffs of the *said districts*," &c. This relates as well to the districts newly created by that act, as to any of the others. But it could then have no present relation to any sheriffs of those districts, for none existed: it could only operate in future, as to them. The construction then contended for by the plaintiff, would give this act of the legislature a double aspect—prospective as to some, and retrospective as to others. The fair inference is, that as the legislature had created some new districts, and altered several of the old ones, and introduced, as to all, sundry new regulations, they intended this system to take its operation when those districts and those other regulations came into action, which was not until after the present sheriffs came into office. They again argued, that the late sheriffs were not within the remedy of this clause; for, they said, this must be purely remedial. The inconvenience complained of, was the delay of finishing executions. To prevent this was the redress or remedy intended. It would be absurd to suppose that they thought of preventing a thing which had specifically happened. All they intended was to prevent the like in future. As to the old sheriffs, therefore, (if suffered to operate at all,) it could not operate as a remedial law, but as a highly penal one; and that would be to punish them by a law made after the fact. But, even if the clause should be held to be ambiguous, it ought to be cautiously construed, in such a manner as to preserve rights antecedently vested. Moreover, the words "sheriffs of the *said districts*," cannot apply to the late sheriff, for

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he was not in office when the law passed. The election of the new sheriff (which was on the same day on which the act was ratified, and that was the last day of the session) was a supercession of his office, and the new sheriff, and not the old one, answered the description, and was on that day one of the "sheriffs of the said districts." But here, said the counsel, we are encountered by some ancient doctrine, that acts take place from the beginning of the session in which they are made, if no time is limited in the body of them for the commencement of their operation. In the first place, they answered this by contending that the operation of the 13th clause was by no means shaken by what had been alleged on the other side. That, though it be true that an execution is no action, yet it is a *suit*; and the words are "such actions and *suits* may be proceeded in" and determined in the same manner as if this act had "never been passed." But, said they, the doctrine that all statutes take effect from the first day of the session is antique, and has long since been exploded as absurd. In one case, a marriage had on the second day of the session of parliament, was dissolved by an act made during the same session. It is a prorogation that constitutes a session, (as laid down in 4 *Co. Inst.* 37.) but modern parliaments are seldom prorogued, but most commonly adjourned. Now, this doctrine might operate to make a statute, passed in the seventh year of parliament, look back to acts done after an elapse of time, equal, in contemplation of law, to the life of a man. Besides, though the doctrine has been so laid down, yet it has been held to be a fiction of law; and though generally it relates to the first day of the session, yet it is not a complete statute till the last day. This is laid down in *Jones*, 370. They cited, also, 2 *Inst.* 292. 1 *Raym.* 370. *Rex v. Sall*; and also relied upon *Silmore v. Shuter*, 4 *Bac.* 636, 7. Indeed, the construction contended for, would make most laws that are passed, have all the effect of *ex post facto* laws. But the old constitution, s. 16. puts this matter beyond controversy; for it expressly provides, that acts of assembly shall have the force

and validity of law, after having the great seal affixed to them in a joint committee of both houses—which is what is commonly called ratifying the laws, and which, in this case, was done on the last day of the session. This, therefore, is a conclusive answer to all the plaintiff's arguments, drawn from this law, that acts take their operation from the first day of the session.

If, then, the sheriff was elected on the same day of the passing of this act, the court will, if necessary for the purpose, construe that election to have been prior, in order to avoid the injustice of taking from the old sheriff, who has performed the labour, the emoluments of office, and putting them into the pocket of the new sheriff, who has not. For the argument drawn from the late constitution, s. 28. that the sheriff is elected, and of course must be in office for two years, admits of an answer from the subsequent parts of the same clause, for though elected for two years, it is there said, that he shall continue in office until the subsequent choice of a successor be made. And this evidently shews, that such choice is the point where the office of the one must cease, and that of the other commence. But if the construction contended for by the plaintiffs would make this act substantially retrospective, or give it the operation of an *ex post facto* law, or law impairing the obligation of contracts, or a law to divest rights antecedently vested, the court can never accede to it. For, it is equally unconstitutional, and repugnant to all the principles of the common law, which says, that a statute against common right and common reason, is void. That it must be retrospective, they had already shewn, as it is required to act upon cases which existed previous to its passing; and even upon officers who ought to be construed to have been out of office. For the same reason, it had already been shewn to be an *ex post facto* law; and also a law impairing the obligation of contracts. For there exists, in the contemplation of law, an implied contract for payment of the fees of office. With equal propriety may it be said, that

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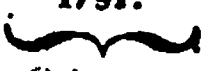
this law will go to the destruction of vested rights : for it had been shewn, that an execution is an entire thing, and that the officer who begins it, may, and must go on and finish. The old sheriff had, therefore, from the principles of law, a vested right to go on and finish the executions ; which right accrued upon the lodging of them in his office. This act, therefore, can never be so ingeniously interpreted as to divest and transfer to his successor this right. The fees and emoluments necessarily belonged to the old sheriff, as the fruit and effect of his labour, as well as the appendages of the executions themselves, that where the one goes, the other *must* follow. To these arguments, the counsel added, that it was highly reasonable and just, not only that the fees for services hitherto done, should belong to the old sheriff who did them ; but that he alone should have the benefit of any future emoluments to arise thereon. He was the one who, in the first instance, had taken upon himself the responsibility of executing the several processes. That he, at the expense of much labour and scrutiny, had found out the property of the several defendants, and laid the executions upon it, and that the remaining part of the duty was comparatively light and trifling. It would, therefore, be extremely unjust and prejudicial, that after he had thus paved the way by his own industry, for the accomplishment of the exigency of the executions, that the new sheriff should be allowed to enter and take to his own use, all the emoluments. In a word, they would adopt the language which had already been used by the plaintiff's counsel, and say, that the labourer is worthy of his hire ; and, therefore, as the old sheriff had sustained the trouble and labour, to him alone ought to appertain the reward.

*Read, Holmes, and Ford*, in reply, still insisted on the grounds they had already contended, viz. the express words of the act. That it would not be unconstitutional, on the ground of being an *ex post facto* law, for that related to criminal cases only ; which doctrine had not been shaken by the defendant's counsel. That as for its being a



law impairing the obligation of contracts; there was no contract in this case: or if there was, it was with the *office* of sheriff, and not with any particular officer. And it was immaterial to which of the particular officers it was paid; provided it was paid *to the office*. That as to destroying vested rights, if there were any such in the case, it was, as had been contended, a right to the fees for service, *when* performed, and not a *right to perform*. That whatever the law might have said, as to the execution being an entire thing, and could not be superseded when once it was begun; this act had altered the law, as it was very competent to do. Besides, it could not be law, in the extent in which it is laid down; for there are many things which can, and necessarily must supersede an execution. An injunction, a writ of error, and an *audita querela*, will substantially supersede an execution; to which it might be added, that a receipt in full from the plaintiff, would have the same effect. As to executions being comprehended under the word "suits," it might be so, and still the case would not be altered; for, by referring to the former part of the same clause, we find it speaks of such suits "as shall be commenced." But it is obvious, that the actions or suits, on which the executions in question were grounded, must have been *commenced*, and even concluded, long before the act passed. As to its being inapplicable to the late sheriff, because he was out of office at the time of the act passing; they said he was constitutionally elected for two years, which had not expired, nor would they expire for a month to come. That a vote of the legislature in electing a successor, was so far from being able to contravene the constitution, that an act passed with all the solemnity of legislative forms, had not the power to do it: from whence they inferred, that the election was no supercession of the then sheriff, but only a *designation* of the person who should succeed him, when his office should constitutionally expire. That the subsequent words in that clause of the constitution, only provided for the case where the office of sheriff

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might expire *before* the election; not when it might *continue beyond it*. From hence they continue to argue, that the defendant was then in office; continued so for nearly a month afterwards; and, therefore, that the words "*shall*" "be obliged, at the expiration of his office, to turn over writs," &c. had an evident application to him.

*Cur. adv. vult.*


And now the judges delivered their opinions.

RUTLEDGE, Ch. J. The question in this case is, whether the 7th clause of the "act for amending the circuit court act," which obliges the sheriffs to turn over to the succeeding sheriffs, all executions, whereon an actual sale of the property, levied by virtue of such executions, has not been made, extends to the late sheriffs, and particularly the sheriff of *Charleston* district. On the fullest consideration, I am of opinion that the construction contended for by the plaintiff, is not warranted by the intention of the legislature, or by the words of the act. By the preamble, the legislature declare, that the several circuit court acts require amendment; they therefore proceeded to make the several amendments which appeared necessary. Amongst others, it appeared necessary to make an alteration in the bounds of some of the old districts, and to create two other districts. This is done. The old names of *Charleston*, *Georgetown*, *Cheraw*, *Beaufort*, *Orangeburgh*, *Camden*, and *Ninety-six*, it is true, are retained; but the bounds of several of the old districts are altered. *Pinckney* and *Washington* are created; and the bounds of every district are established by the 3d clause of this law. No reference is had to former boundaries, nor in this respect, to any former law. As a necessary consequence of creating new districts, sheriffs for them were to be appointed. The 14th section of the law declares, that they shall be immediately appointed; and they were accordingly appointed. Sheriffs were also appointed for all the other districts established by that

act. By the old law, a sheriff going out of office, was obliged to deliver to his *successor*, all writs and processes unexecuted, and he was obliged to execute them. This did not relate to *executions*. Among other amendments which the old law required, the legislature considered that a sheriff on going out of office, should be obliged to deliver to his successor, not only writs and processes unexecuted, as the former law required; but *executions* on which sales had not actually been made. The 7th section, therefore, says, that the sheriffs of each of the said districts shall be obliged, at the expiration of his office, to turn over to the succeeding sheriff, all such executions, &c. To what do the words "*said districts*," refer? Manifestly to the districts of *Charleston, Georgetown, Cheraw, Beaufort, Orangeburgh, Camden, Ninety-six, Pinckney, and Washington; and to those districts established and described by this law*. It is therefore evident, in my opinion, that the act had no retrospect and can operate only upon the present sheriff, and his successors.

BURKE, J. It is admitted that on the 19th of *February* last, the new sheriff was elected under the new state constitution: and that after this election, but on the same day, the present act was ratified by both houses, and passed into a law. If we consider the election of the new sheriff—the displacing (of course) of the old—and the passing of this act: viewing these three circumstances in the order of time in which they respectively happened; we shall find that the business of the two sheriffs was ended, and their situation fixed and settled before the law passed. Prior to its ratification, the new sheriff's right to perform the service of the sheriff's office for two years, and to receive its fees and emoluments, was fully vested in him, exclusively of any other person. The right of the old sheriff, to either, ceased: except as to the few cases of levies made, which the old laws and usage of the office, had referred to be executed by the old sheriff. And in this situation was the old sheriff and the new, at one moment, on the 19th of *February*; and in

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a few moments, or hours afterwards, on the same day, the act referred to, was ratified. These are the facts and circumstances of this case; which, in my opinion, turns upon one point: that is, the period or moment of time when the operation of the act commenced. For if it commenced before the election of the new sheriff, and displacing of the old one, there would be ground to argue that it would be binding on the old sheriff, though he was not expressly mentioned in the act. But if the law began to have effect only from the ratification, then it is much clearer, that the old sheriff's right to go on with the executions levied, is not at all touched or affected by it. The first day of the session has been argued as the date of its commencement. This doctrine though laid down by several lawyers, is not worthy of a serious refutation. Even in *England*, there is as little of law or truth in it as there is in this country. When no particular time therefore, is mentioned in the act, for its beginning to take effect, *the beginning of its existence is the rational and natural time*, and not the first day of the session. The reason and nature of the thing fixes it. But if this were not the case, the late state constitution settles the point, and fixes a day for this and all other acts of the legislature. It is the 16th section, art. 1. and the clause is worthy of commendation, as it settles a point before disputed, and fixes a time, prior to which our future laws cannot operate, but obliged them to commence in futurity, and operate on future events—to look forwards and not backwards. In short, it prevents retrospective and *ex post facto* laws. In the case before us, its efficacy beginning from the moment of its ratification, it cannot be so construed as to have a retrospect, and divest rights that were vested in the old sheriff, under the old laws and constitution of the state. It does not appear to have been the intent of the legislature to, divest such rights, or they would have bound the old sheriff by express words. But the act has done no such thing; having been passed, and beginning to operate after the election of the new sheriff. It left both the new and the old sheriff as it found them—the one out of office, but invested by

the old law, with a right of proceeding with levies already made, and of receiving the fees and emoluments thereon—the other in his office, entitled to the emoluments of *his* labour; but gave him not the fruits of his predecessor's; whereas the contrary construction makes the law to do a manifest wrong by divesting the old sheriff of a common law right, sanctioned by the constitution and the laws, under which he accepted his commission. The cases and authorities quoted in the course of the arguments, do not, I think, generally apply in this, which I take to be a new case. The case of *Gilmore v. Executors of Shooter*, 2 Mod. 310. comes nearer than any of them to the present. There, judgment was given for the plaintiff, by the court, on the very principle on which I ground my opinion; because to use the words of the reporter, it cannot be presumed that the statute 29 Car. II. c. 3. was to have a retrospect, so as to take away a right of action, which the plaintiff was entitled to, before the time of its commencement. I do not think it is against my opinion, if I shall be thought to make fractions of a day against the maxim. I only consult the order and priority of time in which the circumstances which governed the case happened—a thing which may possibly arise in other cases. I shall put one case that may arise out of the act which abolishes the right of primogeniture. Supposing that act passed in the evening, and on the morning of that day, a father should have died, leaving several sons and a landed estate. Here would arise a question pretty similar to the present, relating to the order of time in which the death happened, the descent fell, and the act was ratified. I do not say how this matter would be determined; I only state it to shew, that this and other cases may require a fraction of a day to be made, in order to fix the relation which certain facts and statutes bear to one another, as in the case before us.

It has been urged in favour of the plaintiff, that the old sheriff having been elected in *March*, his time of official service was two years, under the old constitution; and did not expire, nor was the new sheriff in office until *March*

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next, after the ratification of this act. And they argue, therefore, that the act overtakes and binds the old sheriff. In answer to this, it is sufficient to observe, that the old constitution was entirely annihilated and repealed by the new, on the meeting and sitting of the legislature under the latter. The very election of the new sheriff and other rotation officers, which took place, is contemplated—nay, mentioned by the 8th clause of the additional articles; so that the old state constitution did not exist when the election of sheriff took place. As to the unconstitutionality of *ex post facto* laws, there is no occasion here to refer to or apply them. Nor can I say what turn the case would take, if the legislature had ratified the act prior to the election of the new sheriff. Even then I should respect the right of the old sheriff, and be apt to consider him as holding his office and the emoluments arising from it, by virtue of a contract between him and the state, under the laws and old constitution; and I believe my judgment should be for not divesting him of that right, and conferring it upon another, by any construction drawn from implication.

BAY, J. I have the misfortune to differ from my brethren on this question, and shall therefore, deliver my opinion and reasons at large. The principal grounds relied on for the defendant, are the following, viz. 1. That, by law, he was not obliged to turn over executions—for executions being an entire thing, he who begins must end them. 2. That the late law can never be so construed, as to affect him. 3. That if it should, it would be an *ex post facto* law, and therefore void. 4. That the defendant is entitled to *half* fees, at any rate. In order to have a proper clew to this question, I shall consider, 1. What the law was before the act passed, with regard to sheriffs. 2. What the mischiefs were, which this act meant to guard against, between the old and new ones. 3. What is the extent and nature of the remedy provided by it.

1. With regard to the first point, I shall begin by observing on the common law. All sheriffs were formerly

appointed by the king, *durante bene placito* ; were removable by him ; and there was no fixed time for their continuance in office, as we have by our constitution. When a new sheriff was appointed, and had taken the oaths of office, allegiance, &c. a writ issued, called a writ *de exoneratio officii*, which discharged the old sheriff. Then another writ issued to the old sheriff, for delivery of his county rolls and writs, &c. to the new sheriff. The next thing was, that the new sheriff, at or before the first county court, was to take over, from his predecessor, all his prisoners and writs, precisely by *view*, and by *indenture* made between them, wherein all the causes which the old sheriff had, against every prisoner, was particularly set forth, or else the *new* sheriff was not chargeable with them. *Compl. Shff.* 11. 3 *Co. Rep.* 72. *Werbie's case*. So far, then, with regard to the appointment of new sheriffs, and discharge of old ones. The republican principles of our states made them *elective*, and fixed the period of continuance in office. But it was clear, by the common law, that the old sheriff of a county was *still sheriff*, and continued in office until the new sheriff was sworn, although he was chosen before ; “ for it is “ the oath that doth complete him in office.” *Compl. Shff.* 11. *Cro. Eliz.* 12. *Moore*, 188. 364. 3 *Rep.* 72. The 20 *Geo. II.* c. 37. more particularly prescribes the mode of turning over *writs* and *process*, from old to new sheriffs, by indenture and schedule. But this was not introductory of any new law, but only declaratory of the old ; with this only difference, that by the common law it was to be done at the next county court, but by this act it was to be done at the *expiration of office*, and he was made liable to the damage if he did not. The 11th clause of the old circuit court act, passed in 1769, is a transcript of the act of *Geo. II.* c. 37. except as to the second clause, which in that act says, that the sheriff shall not be liable to be called on for return of any process, unless required within six months after his office expires. Nothing, however, either in the statute of *Geo. II.* or in the 11th clause of the old circuit court act of 1769,

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related to *executions*. They depended on the principles of the common law in *England*, and do so still: and so did they here, until the passing of the late act. By the common law, an execution is an entire thing, and he who begins must end it. If, upon a *fiery facias*, a sheriff seize goods, he returns that they remain in his hands, *pro defecta emptorum*, and he is removed; yet he, and not the new sheriff, is to proceed to the execution. He acquires a property in the goods, by the seizure which divests the owner. He may maintain trespass or trover for them: they are in him by operation of law, until sale is made. This, then, opens the door for the application of the law, and all the authorities which were cited with so much ingenuity from *Bacon*, *Salk.* *Dalt.* *6 Mod.* *Cro. Jac.* *4 Inst.* and all the authorities which went to establish this point, and which were so ably commented on by the counsel, in the course of the argument. It is good law in *England* at this day, and was so here until a late day, to wit, *until altered by our late act of assembly*. Thus far, with regard to the law, before the passing of the last circuit court act, which brings me to consider,

2dly. What were the mischiefs intended to be guarded against by this act. And here I must observe, that they are not particularly mentioned or recited in this act, because it embraces a great variety of objects. It alters the times of holding the courts of justice in this state; it creates new districts, regulates the manner of proceeding in some degree, and introduces a number of new and excellent regulations, which were unknown in former laws. And, among other things, it prescribes and regulates the mode of turning over unfinished business, from the old to the new sheriffs. It only recites, generally, "that the several circuit court acts, in this state, require amendment." The inconveniences under each head, are not mentioned, but must be collected from the general complaints of the people, and the difficulties which occurred in the course of conducting business, and which gave rise to the regulations. Those which happened upon the going out of the old, and the coming in



of the new sheriff, required great attention. Formerly the office was held by a provost-marshal, *during pleasure*, who generally kept it a *number of years*, so that these inconveniences were seldom felt. But by our late constitutions there was an election every *two years*, which occasioned a rapid succession in office ; and, as there was a great accumulation of business, there was generally left in the hands of the old sheriff, a large arrearage unfinished and unexecuted. The old sheriffs generally retained the unfinished executions, as by law they might do, for a final settlement. And as payment of debts was suspended, by a number of interfering laws, it was, frequently, many years before the business could be closed. At the same time, it was very *difficult* to know the state of the executions, and the security for payment of them ; and what rendered this difficulty greater, was, that every succeeding sheriff knew nothing of what had been done by his predecessor, on these executions, but was totally in the dark respecting them. They often (as a consequence) seized property which had been bound by prior executions, of which they were not apprised until the hour of sale, while parties were obliged to apply to one, two, or three sheriff's offices, in order to know the real state of the business. Add to this, also, that many of the old sheriffs, having gone out of office, were not very punctual, but often very inattentive to the remaining duties of it ; and were not very alert in settling executions, which they knew they could retain and settle at their leisure. By this means, creditors were left in the dark respecting their debts, and the gentlemen of the bar, who conducted the business, were, themselves, unable to inform them. These, therefore, were some of the inconveniences that gave rise to the regulations which are the subject of the present debate ; and the clause of the act upon which the plaintiff now founds his claim, and the subsequent one, which requires all sheriffs to make a return, on oath, of all executions, within ten days after the return day, were introduced, in order to give consistency and despatch, regularity and certainty, in the she-

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riffs' offices throughout the country ; that every man, at one glance, might see the real situation of every execution in the state. And this brings me,

3dly. To consider the nature and extent of the remedy provided by this act. The 1st clause establishes the powers of the different courts. The 2d fixes the time and places of holding them. The 3d describes the boundaries of the districts, and creates two new ones. The 4th defines the power of the judges. The 5th directs the mode of issuing executions. The 6th regulates the proceedings of the court. And the 7th clause, which is the one now under consideration, prescribes the duty of the old sheriffs, upon going out of office, and the manner in which they shall turn over the business of the office to their successors. The first part of this clause relates to *writs* and *process*, and says, that they shall be turned over in the same manner as directed by the circuit court act of 1769, which is a copy of 20 *Geo. II. c. 37*. The latter part of this clause goes one step further, and says, that all *executions* shall also be turned over, where no actual sale of the property has been made. Here, then, for the first time in the history of our legal jurisprudence, are *executions* directed to be turned over to new sheriffs, in the same manner as writs and process. This controls the common law, and is introductory of a *new law* on the subject. This, then, is at once an answer to all the *common law authorities* which have been cited on the occasion. The 8th clause of the act goes on, and directs the mode and manner of return the sheriffs are to make of all executions into court. But, say the counsel for the defendant, although this 7th clause does alter and control the common law, with regard to turning over executions *in future* ; yet it shall not be construed to have a retrospective operation, as the defendant, *Huger*, was not in office when that law passed. I will only observe, here, that part of this clause will admit of this kind of construction, (if it were necessary to resort to it,) though the former part be doubtful. For it says, "all executions whereon *he hath* not made

"actual sale of the property," &c. I do not, however, conceive that there is any occasion for having recourse to this kind of retrospective construction. All the sheriffs in this county, held their offices, under the late constitution, for two years certain. This is not denied. No *law* could deprive them of this right, or alter the term ; it would have been unconstitutional. They held their offices for the time, as sacredly as the judges held their commissions during good behaviour. And this, it has been determined, neither the convention itself, nor the legislature, could interfere in. Taking this, then, for granted, let us see how the matter will stand. The late sheriffs were chosen towards the end of *March*, 1789, as may appear by the journals of the house ; of course they had a constitutional right to hold and exercise their offices until the end of the same day in *March*, 1791. Nothing could destroy this but a removal by impeachment. The present law passed the 19th of *February*, 1791, more than a month *previous* to the expiration of the old sheriffs' offices ; of course, the present act found the defendant, *Huger*, in office ; and if so, he is clearly bound by it.

The present law does not extend back to the first day of the session, because the 16th section, 1st article of our constitution, fixes that point. There is no occasion to put such a construction on it, as has been ably contended in the argument. The plaintiff, *Osborne*, it is agreed, was elected on the day the law passed, the 19th of *February* ; but did not qualify till the 16th of *March* following. But this election gave him no power to act, agreeably to the common law already observed upon ; because it is there laid down by Lord *Coke* and many others, that the old sheriff still continues in office (though a new one is chosen) till the new one is sworn in ; "*for it is the oath that completes him in office.*" The election only determined who should succeed the defendant, *Huger*. But the plaintiff, *Osborne*, had no right to enter on the duties of his office, even after the 16th of *March*, although sworn ; because the former had a constitutional right to exercise it until the

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end of *March*, and the plaintiff was not regularly in office until the term expired. Upon the whole, therefore, I am of opinion, that *Huger*, the defendant, comes under the letter and spirit of the 7th clause of this act, and that he ought to turn over, not only all writs and process, but all executions also, to his successor, according to the terms of the law. As to its being an *ex post facto law*, there is no occasion to go into the consideration of it. To suppose that the supreme legislature of a sovereign country, has no right to regulate the conduct of its officers and the mode of business, would be straining the matter far indeed. With regard to the half commissions mentioned in the 10th clause of the *instalment law*, I conceive they are *vested rights*; and the defendant had a power to receive them long ago from the debtors, with fees and charges; and there is nothing in this clause which has or could deprive him of them. The proviso in the 10th clause of the *instalment law*, leaves an opening for the clause in the present law; and one would think it had this part of the act in contemplation, by saying, that the half commissions received by the old sheriff, should not be paid to, but should be credited by, his successor. And this division of fees between old and new sheriffs, is not altogether novel. For by the 3d *Geo. I. c. 15.* when any sheriff shall extend any goods to the use of the king, and shall die, or be removed from office before a *venditioni* be awarded for sale, and a writ be awarded to a subsequent sheriff, who shall sell; the barons of the exchequer shall settle the fees and poundage between the old and the new sheriff, agreeably to the trouble each had in the execution of the process. Here it is not left to the judges to fix it, but it is ascertained by law. Having thus stated my reasons for differing from my brethren, I submit with respect to the opinions they have delivered on the subject.

*Per Curiam.*

Judgment for the defendant.

The STATE *against* JONES.*May Session.*

**FORGERY** of a three pound bill of the paper medium of *South-Carolina*. The indictment contained two counts : 1st. For counterfeiting the bill in question. 2d. For uttering the same, knowing it to be counterfeited, with an intent to defraud.

Forging a 3l. bill of the paper medium of the state, with two of the commissioners' names only to it, does not constitute a capital offence, under the act of assembly giving currency to such bills.

After several witnesses were examined, which brought the fact of passing the bill fraudulently, home to the prisoner ; Mr. *Thomas Jones*, one of the signers of the paper medium bills, was examined. He deposed that the bill in question was not signed by him ; that it was a counterfeit bill ; and that all the true bills were signed by three commissioners ; whereas the one on which the prisoner was indicted, had only two of the commissioners' names to it : the name of the third was omitted. Upon this

*Holmes*, for the prisoner, took an exception to the indictment, upon the ground that the bill or instrument charged to have been forged, in the indictment, was not such a bill as was authorised by the act of assembly for issuing the paper medium ; but a different bill, having but two of the commissioners' names signed to it : whereas the act referred to, required that those bills should all be signed by three commissioners. And that therefore, as this was a different bill from those authorised by the act, it could not be the subject of forgery, so as to bring the offence under the penal clause of the act, which made it felony to forge or counterfeit the bills issued in pursuance of that law. And in support of this doctrine, cited *Moffat's case*, in *Leach's Cro. Cases*, 372.

*Harper*, on the same side, contended, that to constitute a forgery, the instrument forged must, upon the face of it, purport to be good in itself, otherwise, it is only a misdemeanor ; that it was evident the bill in the present case, did not purport to be a good one ; that is, such a one as the act directed and prescribed. Of course, the prisoner

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could not come under the penal clause of the act, however he might be liable to an indictment for a misdemeanor. That the principles laid down in *Ann Lewis's case*, *Foster*, 116. and *John Stirling's case*, *Leach*, 368. both confirmed this doctrine. *Ann Lewis's case* was for forging a letter of attorney from one *Elizabeth Tingle*, a person that never existed, a mere fictitious person, but who was supposed to be the daughter of one *Robert Tingle*, with intent to defraud one *Edward Mason*. But this deed purported upon the face of it, to be a good one; it contained every requisite, and appeared to have been made by some person really existing, whose deed, by possibility might have been forged, and being uttered with intent to deceive, it came under the act of *Geo. II.* upon which that indictment was framed. *John Moffat's case* was for forging a bill of exchange for 3*l.* 3*s.* sterling, payable to himself or order, signed *Walter Stirling*, and an acceptance by *G. Petiers*, of the bank of *England*; and for uttering the same, knowing it to have been forged, with intent to defraud, 1st, *William Bell*, and 2d, *G. Petiers*.

By two acts of parliament, of the 15th and 17th *Geo. III.* it is enacted, that all promissory notes and bills of exchange, in *England*, for any sum above twenty shillings and under five pounds, shall be drawn and indorsed in the manner and form prescribed by those acts, (which form is inserted in the body of the acts,) and there is a clause in the acts, which says, that all bills, notes, or indorsements, for 20*s.* and under 5*l.* drawn otherwise than directed by these acts, shall be utterly null and void. The bill in question, in that case, not being in the form prescribed by those statutes, the question was, whether it could be the subject of a capital forgery? In *February*, 1787, this matter was referred to all the judges for consideration, and, being a matter of much consequence, they took time for consideration; and, in *May* session following, Mr. Justice *Ashhurst* delivered their unanimous opinion: that as the forgery was committed before the expiration of the statutes of the 15th and 17th *Geo. III.* the bill of

exchange, if real, would not have been valid or negotiable, and therefore the forging of it was not a capital offence. So, on the same principle and reasoning, this not being such a paper medium bill as the act of the legislature authorised and prescribed, he contended that it could not, upon the authority of these cases, be the subject of a capital forgery.

*The Attorney-General*, in reply, said that there was a distinction between *Moffat's* case, just alluded to, and the present. There, it was true that the two acts of parliament of Geo. III. prescribed the forms of bills and notes of certain denominations ; but it went one step further, and declared that all notes and bills, &c. which were not drawn in the form prescribed by those statutes, should be null and void. In the paper medium act there was no such negative clause, and therefore the reasoning in *Moffat's* case did not apply. That law does not say if these bills were signed only by two commissioners they should be void. If it had, the case would have been otherwise ; the offence would not have been a capital one.

BAY, J. Penal laws ought to be construed strictly, and not by construction or implication ; and more especially where the life of a citizen is at stake. In such a case, every thing shall be presumed in his favour, which is not proved by the clearest evidence and reasoning to the contrary ; and which does not bring the case under some express law, that in clear and explicit terms, affects the life of the prisoner. The indictment, in the present case, is framed on a clause in the paper medium act, which makes it felony to counterfeit any of the bills thereby authorised to be issued. This act creates, in the first place, a new species of paper currency ; prescribes the manner and form particularly in which they shall be issued and signed ; and makes them receivable at the treasury (when thus issued) in payment of debts, duties and taxes. After the form is prescribed in the act, it directs the manner in which they shall be signed, which is worthy

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of remark, as the initials of three names are expressly annexed to the form : “ *A. B. C. D. E. F. commissioners.*” The following clause expressly enacts, that as soon as they are struck off, they shall be numbered and signed by the three commissioners, to be appointed as by that act directed. There is no clause in this law, it is true, which says that bills issued in any other form than that prescribed by the law, and signed as thereby required, shall be null and void, as in *Moffat’s* case, on which the *Attorney-General* laid so much stress. But it is evident that any bills not signed by the three commissioners, as the law directs, that is, such as are signed by one or two commissioners only, would not have been receivable at the treasury, because they were not such as the act required and makes receivable there. And although there is no negative clause which makes such bills void, yet they would have been void in law, for *expressio unius est exclusio alterius* ; and such a negative clause, if it had been inserted, would only have been declaratory of what the common law was before ; for, wherever a law makes and prescribes a particular form for any particular purpose, in that case, no other kind of form shall be received and taken for a true and proper one. In the present case, then, it is clear that the bill stated in the indictment upon which the prisoner is charged, is not such a one as the paper medium law directs, having but two of the commissioners’ names to it. It does not purport to be a true bill upon the face of it ; (as in *Ann Lewis’s* case, *Foster*, 116.) and if it is not such a one as that law requires, then the forging of it cannot be punished by that law. It cannot be the subject of a forgery, so as to make it a capital offence under the penal clause of that act. *Moffat’s* case is directly in point ; and there it is expressly laid down as the unanimous opinion of all the judges, after great deliberation, that the bill of exchange, in that case, not being agreeable to the statutes, if real, it would not have been negotiable or valid, and therefore the counterfeiting it was not a capital offence. So that, in the present case, if one of the commissioners had accidentally omitted to have signed his name to any



of these bills, they would not have been receivable or valid at the treasury, not being issued as the law directs ; *a fortiori*, therefore, the making of a bill not agreeable to the form directed in the act, cannot be a capital offence under it.

Let the indictment be quashed, and the prisoner discharged.\*

\* See *Gutridge's* case, where the same point was determined when all the judges were present.

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#### DA COSTA against SHREWSBURY.

September  
Term.

THE bond in this case was given by the defendant to *Da Costa*, for a tract of land, which was, at the time of sale, under mortgage to *Commodore Gillon*, for a sum equal, or nearly so, to its full value ; but *Da Costa* did not inform the defendant of this circumstance at the time the deeds were executed, or at any time during the negotiation. *Da Costa* being indebted to *M<sup>r</sup> Whann*, the *real* plaintiff in this cause, afterwards passed away this bond in payment to him ; but, previous to the passing of the bond, *M<sup>r</sup> Whann* sent to the defendant, *Shrewsbury*, to know if he had any discounts against it, or any objections to the bond being assigned over. He sent word, for answer, that the bond was justly due, and begged that he (*M<sup>r</sup> Whann*) would take it out in work, the defendant being a carpenter. Upon which, *M<sup>r</sup> Whann* took an assignment of the bond, and gave *Da Costa* credit accordingly. Soon after, however, the defendant discovered that the land, for which he gave his bond, was under mortgage to the amount of its value, and that the *nominal* plaintiff, *Da Costa*, could not take it up. He thereupon refused to pay the bond, and *M<sup>r</sup> Whann* accordingly

The assignee of a bond, takes it subject to all the equity and rules of law to which it would have been liable in the hands of the obligee, notwithstanding the obligor promised to pay it at the time of assignment. No such promise of payment to the assignee, who is not a party to the suit, shall be given in evidence, though he be the real plaintiff.

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commenced this action, in the name of *Da Costa*, for the recovery of it. On behalf of the holder, *M<sup>c</sup>Whann*,

*Pringle* contended, that *M<sup>c</sup>Whann*, the real plaintiff in the action, was a fair purchaser, for a good and valuable consideration ; and there was a promise of payment, or acknowledgment of the justice of the debt when the bond was transferred, which was *M<sup>c</sup>Whann's* inducement for taking the bond. To support this promise, the plaintiff offered to produce evidence ; but this being objected to by *Rutledge*, for defendant,

*The Court* refused to allow any evidence to be given of a promise made to one who was not a party to the suit. It was, therefore, then contended, by

*Pringle*, that there was a deception on the part of the defendant, by his holding out false colours to the present holder of the bond, which induced him to receive it in payment, and afterwards in refusing to pay it. At any rate, if there was no intentional fraud, there was that neglect or omission on his part, which ought to make him liable ; because he might have informed himself of the mortgage, by searching the records in the proper office. If he had done so, the assignee of the bond would not have been imposed upon, by taking the assignment of it in payment.

*Per tot. Cur.* (present, the CHIEF JUSTICE, and Judges BURKE and BAY.) The plaintiff ought not to recover in this action. The law is clear, that every person who takes an assignment of a bond, must take it subject to all the equity and rules of law, to which it would have been liable and subject, in the hands of the obligee. The promise of payment to the assignee, (if any evidence of it had been permitted to have been given,) would not have altered the case. It could not have been of so high a nature, being only *parol*, as the deed under seal, to the obligee ; which being given to secure a valuable purchase, and the consideration failing, the deed itself failed with it. Besides, the present action was not founded on the defendant's *promise to*

*M'Whann*, but on the *bond given to Da Costa*: he therefore, does not come in under *his own right*, but in right of *Da Costa, as assignee*. That being the case, therefore, he can have no greater right than *Da Costa* had—and his right failing, there ought not to be a recovery in the present case. *Loft. 319. Vern. 428. 1 Bac. 157.\**

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\* N. B. Since the determination of the above case, an act of the legislature of this state has enabled the assignee of a bond or note, &c. to bring an action in his own name; subject, however, to all the rules of equity, &c. as if it had remained in the hands of the original obligee.

TUCKER against CHARLES LOWNDES.

September  
Term.

UPON a rule for the sheriff to bring money into Court, in order to discharge the instalments due on a judgment in this case. It appeared by a list from the prothonotary's office, that this was the ninth judgment against the defendant. It was urged, at the same time, that most of the prior ones were unsettled.

*Holmes*, for the rule, argued, that the prior judgments only bound for the *instalments due* at the time of the *commencement* of the different *actions*, as *no notice of demand of security* agreeable to the instalment act, was *proved*: and that some of the actions were commenced against the defendant, when only *one or two* instalments *were due*. That this, of course, would leave money enough in the sheriff's hands to pay his client (although his judgment was the ninth in order) the instalments due on his judgment.

*Rutledge* and *Ford*, against the rule, insisted that every judgment bound agreeable to its priority, for the *whole amount* of the plaintiff's demand, both at common law and by the *statute of frauds*. That the instalment law did not lessen the plaintiff's security, or deprive him of his prior right. It only gave time to the defendant to raise the money, and prevented the plaintiff from recovering, (i. e. levying) otherwise than by instalments. They compared it to

Every judgment binds for the whole amount, notwithstanding the instalment act, which says, that debts shall only be recovered by instalments. This act does not alter the common law or statute of frauds, in that respect; consequently those judgments must be paid off by the sheriff in rotation, agreeable to their seniority. It is too late, after judgment for defendant, to take advantage of want of demand of security. It ought to have been pleaded to the action.

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a bond given with a penalty, to pay money at different days ; where, upon failure of payment, on any of the days, the penalty became forfeited, and judgment on that, bound for the whole amount ; though the plaintiff could not levy for more than the sums really due, until the whole became payable. That to give any other construction to the instalment law, would greatly diminish the securities of the country, and set afloat a great part, if not the whole of the judgments entered up since that law passed. With respect to the *demand of security*, that advantage was *waived* by the defendant's not pleading it in *bar* to the action. It was too late, after judgment, to make that a plea for not paying the money, or setting aside a judgment obtained without such demand.

*By the Court unanimously.* Every judgment binds for the whole amount in order, agreeably to seniority. The instalment law does not alter the common law or statute of frauds, in this respect—though the defendant may, at any stage before judgment entered up, come in and pay the instalments due, and give security for the residue, and by that means discharge the suit. It is the duty of the sheriff, in every case where an execution comes to his hands, to sell as much of the defendant's effects as would pay off the instalments due to the plaintiff in *cash*, and as much more on a *credit*, agreeable to the instalment law, as would fully satisfy the plaintiff's judgment, and deliver over to him such bonds, with security, as he may take for the credit of the judgment ; and so on, in like manner, to every subsequent creditor, agreeable to seniority.

With regard to the demand of security—although the want of it might be pleaded in bar to the action ; yet this advantage has been waived by the defendant. It is too late, after verdict and judgment, to make it an objection. *Lucas Ca.* 431. 440. *Ibid.* 38.

Rule discharged.

Present, RUTLEDGE, Ch. J. and Judges BURKE, GRIMKE, and BAY.

## PORTEOUS against SNIPES.

DEMURRER to plea in bar to debt on bond, given in the court of chancery, to enable *Thomas Washington* to obtain an injunction there. In this case, the plaintiff had a judgment at law against *Thomas Washington*, who applied to the court of chancery for an injunction; and in order to obtain it, the defendant, *Snipes*, entered into a bond with him as security, agreeable to the directions of the act prescribing the terms of obtaining injunctions, &c. The bill in chancery was, however, dismissed; and after the dismissal, the plaintiff, *Porteous*, proceeded on his original judgment against *Washington*, took out a *capias ad satisfaciendum*, upon which he was taken, and died in goal, insolvent, as was alleged; having in fact been executed for forgery.

After the death of *Washington*, the plaintiff, *Porteous*, brought an action on the bond entered into by the defendant, *Snipes*, when the injunction was obtained; and the defendant prayed *oyer* of the condition of the bond, which was, "that *Washington* should abide by the order of the court of chancery, in that cause, and pay and satisfy the plaintiff the amount of his judgment at law, together with costs of suit;" and then pleaded in bar to the action, that it would not lay against him; because the plaintiff, *Porteous*, had, after the dismissal of the bill in equity, made his election, and proceeded on his judgment at law, against *Washington*, and taken him in custody, on a *ca. sa.* And that the taking, and his dying in gaol, was such a satisfaction in law, as discharged him as security on the injunction bond.

To this plea the plaintiff demurred, and the defendant joined in demurrer; which brought the point before the court—whether this was a good plea in bar to the plaintiff's action, or not?

Where a person has a judgment at law against a defendant, who afterwards applies to chancery for an injunction to stay execution, which upon hearing, is dismissed; and he afterwards proceeds to take the defendant's body in execution, who dies in gaol: this shall be a good discharge of the bail on the injunction bond; as the party, by making his election to proceed against the defendant on the original judgment, thereby waives his right against the bail on the injunction bond.

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For the plaintiff, it was contended, that the clause in the court of chancery act,\* which regulates the manner of applying for injunctions to stay proceedings at law, altered the old terms of obtaining those writs; which required that the sum recovered, should be deposited with the master, before any such writ could be obtained; and, in lieu thereof, directed that bond and security should be given, to answer and abide the decree or order of the court, in such sum as the master should think reasonable and proper. This, it was said, was intended to ease the defendant at law, who might have equity on his side, but who could not conveniently raise the cash to deposit in the hands of the master, before he could obtain the injunction. That the plaintiff at law was to be made secure at all events, and that it was never intended to place him in a worse situation, eventually, than he would have been had the old law remained in force, and the money paid into court; in which case, all that he would have had to do, after a bill was dismissed, would have been to have gone to the master, and received the money deposited. The next best thing to the money, it was said, is the security for it. That was the end and design of the legislature in passing the clause in question. The present is an *absolute undertaking* of one person for the *debt and duty* of another, and *does not depend* upon any *possible contingency* which *can or may* defeat the obligation of the other, and not *defeasible* upon the surrender of principal, as in cases of bail; and that this was the first instance in which it was ever contended that an attempt to get money from the principal, deprived a man of his remedy against the *security*.

The plaintiff was not bound here, as in some other cases, to make his election and proceed in one way, so as to deprive him of his remedy in another; but every one remained, and still remains open to him, and he was at full liberty to pursue his execution and *take the body of defendant*, or to commence his suit on his bond, and go against

\* *Gri mke's* collection of the Public Laws, page 338.

the present defendant, or both together, as he thought proper: in the same manner as a man may foreclose a mortgage in chancery, and pursue his remedy at common law at the same time. *Black. Rep.* That if this case has any similitude to bail, it must resemble, 1st. Bail in error, or 2d. Bail under the attachment law. If it should be assimilated to bail in error; then, according to 3 *James*, c. 8. the security is never exonerated till the last farthing of the debt is paid. The words in the statute of *James* are the same with those in our court of chancery act, viz. "That defendant do *satisfy and pay*" the debt, damages and costs, in case judgment should be affirmed, &c. and if he does not, *that then bail shall do it for him*. So, likewise, if it be compared to bail under the attachment law, it will appear equally evident, that the security is liable, at all events. The words of the eighth clause of that act are, "If the absent debtor shall, within a year and a day, come in and put in bail to answer the action, *and pay the condemnation money*, then the attachment shall be dissolved, and the goods attached, restored to the persons putting in bail. And such *person* and his *security*, so putting in bail, shall be liable to pay the plaintiff his judgment, with all costs and charges," &c. So that whether this case be governed by the rules of bail in error, or bail under the act already mentioned, the plaintiff in this action, is well entitled to a recovery. They cited and relied on 1 *Mod.* 214. 2 *Mod.* 194. 3 *Black.* 414. *Levintz*, 203. in support of this part of the argument, and then contended, that the dying in gaol of one co-obligor, did not discharge the other; though the person so dying in gaol, was charged in execution. In support of this position, *Bloomfield's* case, 3 *Cook's Rep.* 87. was cited: also, *Hobart*, 59. *Cro. Jac.* 136. 143. *Bulstrode*, 100. 1 *Bac.* 212. 2 *Show.* 294. 10 *Vin.* 579. 11 *Vin.* 28.

For the defendant, the counsel opened the arguments, by observing, that it was always regarded as a hard case, to oblige one man to pay the debt of another. That the

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attorney for the plaintiff at law, had therefore acted very properly after the bill was dismissed in equity, in pursuing his remedy on the judgment, as the speediest and easiest method to recover the money for his client, and that too, from the party who was bound in justice and conscience to pay. That it would have been rigorous, and out of the usual course of practice, to have proceeded against the present defendant, *Snipes*, on the security bond in the first instance ; especially, as it was not known that the circumstances of the principal, *Washington*, were so desperate at that time, as was afterwards discovered. That with weak-minded men, success appeared to be wisdom ; while others estimate the measure adopted, independent of its success. The conduct of the attorney, was therefore highly commendable in proceeding as he did. ' They contended, that the moment the bill was dismissed in chancery, plaintiff had his choice of two remedies ; either of proceeding on the judgment against the defendant at law, or by pursuing it on the injunction bond. That however, as soon as he had made his election in either way, it was a waiver of the other remedy, and that he was then precluded from pursuing any other mode. *Unusquisque potest renunciare jure, pro se introducto* ; and in support of this, *Vin. tit. Waiver*, 259. 530. and 531. That the reason why a party is permitted to proceed on a bond at common law, and to foreclose a mortgage at same time, was because the property mortgaged might not be sufficient to pay the debt ; but, upon the judgment at law, other property might be found, which would pay it off fully. Besides, in such a case, it is the party's own original undertaking, and not a collateral one for a third person. That it was very evident, that this was not an original undertaking, but only a collateral one, upon the default of another. It was said, that this was in nature of bail in error : and that the words in the condition of the injunction bond, were the same as in the bond directed to be taken by the statute of *James*. Admitting it was so ; yet, even bail in error may surrender principal in discharge of himself—



as in the case of *Austin and Nowlan*, Roll. 392. 3 *Bulstrode*, 191. *Cro. Jac.* 402. *Moor.* 853.

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It had been next compared to bail under our attachment act. But, in answer, it was asked, suppose the plaintiff gets judgment against the absent debtor after his return, and takes him in execution on a *capias ad satisfaciendum*; can he afterwards go on the bond against the bail? This had never been done, and would not be permitted. So, in the present case, the defendant at law being taken on a *ca. sa.* and dying in gaol, was an exoneration of the now defendant from his securityship—and for this reason, that the party has got the highest satisfaction the law knows or allows. That it was a well established rule of the common law, that by a person dying in execution, the debt was gone; as is very fully laid down in *Foster and Jackson's* case, *Hob.* 59. It is true, the statute of *James I.* revived the suit against executors upon a *scire facias*; but it did not survive against his security. That the doctrine of co-obligors, and one dying in execution in gaol, did not discharge the other, was very good law, but not *applicable* to the *present* case; for, the obligations *alluded to*, in all the cases cited by the opposite counsel, are *original undertakings*, and not *collateral* ones, as the one under consideration most certainly was. And that therefore, none of those authorities would apply to this case. That in all cases of collateral undertakings, which are in their nature defeasible, by the performance of certain conditions, by the party for whom the undertaking is made; both by the common and civil law, where the conditions are performed, the collateral undertaker is discharged. What were the defeasible conditions in this case? Why, that *Washington* should *pay* or *satisfy*. Payment was one condition; *satisfaction* was another. This satisfaction was fully made by the body of *Washington*, for whom the defendant, *Snipes*, had undertaken; and, consequently, he was for ever discharged from the force of the obligation; as much so as if the money was paid.

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*Per Cur. unanimously.* The bond on which this suit is brought, must be considered either

1st. As an original undertaking in the defendant's own right.

2dly. As a collateral one in default of another ; or

3dly. As a bail bond, or in nature of one.

If an original one, nothing can discharge the defendant, but the full and complete payment of the debt and charges. If a collateral undertaking, the bond is defeasible by the performance of the condition by the party, for whose default the defendant became bound. If in the nature of bail ; then, from the very legal import of the term, the party might surrender himself up, in discharge of his bail ; or the bail might have surrendered the principal, in discharge of his bond or recognisance ; or his being taken in execution on a *ca. sa.* and in custody, exonerated the bail.

1. That he cannot be considered as an original undertaker, will appear evident from his not being a party, either in the suit, or in the bill in equity. The plaintiff, *Porteous*, had no claim on him, when the suit was originally commenced at common law ; for he was no party to the contract ; and when *Washington* went into chancery, the defendant, *Snipes*, was no party in the bill which prayed for the injunction. *Snipes* only came forward as his friend, to enable him to obtain that redress which he conceived himself entitled to, from the nature and equity of his case, and engaged that *Washington* should abide the decree of the court of chancery, or pay and satisfy the plaintiff at law. The performance of the condition was entirely on the part of *Washington* : the defendant, *Snipes's* name is not mentioned in it. It is evident, therefore, that he ought not, nor cannot be considered as an original undertaker, so as to make him chargeable in his own right.

2. That from the very nature of a collateral undertaking, if the party in the original obligation, performs the conditions in the contract, the collateral undertaker is discharged. What then is the nature and extent of the present undertaking ? Why, that *Washington* should abide the order of

the court of chancery, or pay and satisfy the judgment at common law. If there had been any decree in chancery, it is clear *Snipes* would have been bound, if *Washington* had not performed; but there was none—of course there was nothing obligatory on him in chancery. The bill was dismissed, and the plaintiff left at liberty to proceed at law. At this stage of the business then, the plaintiff was free to pursue whatever right the law gave. There were two remedies: first, upon the original judgment against *Washington*; or, secondly, on the bond against both, for payment of the money. It was at this period that the plaintiff had to decide which remedy he would follow. He did so; he made his election, and proceeded against the defendant on the original judgment, took his body in execution and he died in custody.\* His election in this case, was conclusive against him. The cases cited from *Viner*, are clear on the subject. His being in custody, and dying in gaol, is a satisfaction in law, and one of the highest nature. It is a performance of one of the conditions of the bond, entered into when the injunction was obtained. Although the words in the condition of the bond are in the copulative pay *and* satisfy; yet they may well be construed to be in the disjunctive pay *or* satisfy. So that satisfaction in any other way, than payment of the money, is a defeasance of the bond, inasmuch as payment of the money would have been.

3. Should this however be considered in nature of bail in error; still, according to the cases in the books, the bail might have surrendered the principal: and if he might have surrendered him, his being taken in custody (which is tantamount to a surrender) and dying there, amounts to a discharge of the bail at common law. *Roll.* 392. *Moor.* 853. 3 *Bulstrode*, 191. 1 *Bac.* 218. 1 *Roll.* 337. *Moor.* 888. If it should be considered in nature of bail under the attachment law, if the plaintiff in attachment will (as has

\* *Washington* was executed for forgery, though the fact did not appear on the face of the pleadings: they only stated, that he died in gaol, being in custody before he was accused of the forgery.

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been well observed by the defendant's counsel) relinquish his bond, and proceed to judgment against the absent debtor, and charge him in execution, it would be a waiver of his right against the security to the attachment bond. As to the cases cited by the plaintiff's counsel respecting co-obligors, and one dying in gaol not being a discharge of the other, they do not apply in the present case. They all relate to original undertakers; parties to the original contract, and not to collateral engagements. Upon the whole, the court are of opinion, that the plea in bar is a good plea, and ought to be sustained; therefore,

Let the judgment be for defendant.

Present, the CHIEF JUSTICE, and Judges BURKE, GRIMKE, and BAY.

*Pringle, Fraser, Parker, Ford, and Désaussure*, for plaintiff.

*The Attorney-General, Pinckney, and Harper*, for defendant.



### LANG against BRAILSFORD.

*May Term.*

A protest is not necessary to charge an acceptor with the principal of a bill of exchange; but it is materially so, in order to charge him with interest for non-payment; because it is evidence of a demand, which ought to be proved, before the party can be chargeable with any neglect.

CASE upon a bill of exchange. The bill, it seems, was drawn by *Powell, Hopton, and Co.* dated *Charleston, December 1st, 1776*, upon *Samuel Brailsford*, the defendant, in *Bristol*, requiring him two years, after sight, to pay to *Richard Champion*, or order, a certain sum. It was accepted by *Brailsford* thus: "Accepted, payable at the house of *Brown and Collingson, London. Samuel Brailsford.*"

because it is evidence of a demand, which ought to be proved, before the party can be chargeable with any neglect.

At the trial it was admitted, on the part of the defendant, that he was one of the house of *Powell, Hopton, and Co.* That this bill was accepted, as appeared by the face of it. That though indorsed to *Lang*, the interest that might be obtained upon the bill, was still to be the property of *Champion*. On the part of the plaintiff, it was admitted, that no protest of this bill for non-payment, had ever been made; and by both parties, admitted, that *Champion* and *Brailsford* resided, during the whole of the late revolutionary war, in *England*, and that for several years since the peace, they have both resided in this state. No demand, however, was proved or admitted, of the principal or interest, either in *England* or *Carolina*: nor any application for payment to Messrs. *Brown* and *Collingson*; neither was it proved that they had any funds of the defendant in their hands, either at the time of the acceptance, or at any time after it.

The case came on to be tried by a special jury, before the CHIEF JUSTICE, and Justice BURKE, when

*Pinckney* and *Rutledge*, for defendant, objected, that though the principal sum in this bill was recoverable, yet no interest could be recovered; because the bill was never protested for non-payment, nor any demand made, either of *Brown* and *Collingson*, the defendant's bankers, or the defendant himself. They urged, that when a bill is accepted and not paid, it is necessary for the holder immediately to have it protested, in order to entitle himself to interest and damages. That the custom of merchants required this, and the law uniformly laid it down as a duty incumbent on the holder. But at least, there ought to have been a demand upon Messrs. *Brown* and *Collingson*, the bill being expressly accepted payable by them. That the drawee of a bill, may accept it conditionally or specially; and though the holder may object to such an acceptance, and protest the bill, yet if he admits such acceptance, he will be bound by it; and cited 2 *Str.* 1152. *Smith v. Abbott*. That here, the plaintiff was satisfied with the bill, as was accepted at the time, and therefore must look to *Brown* and *Collingson* first for the money. That the defendant was obliged, upon the

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penalty of becoming a bankrupt in *England*, to keep money in the hands of his bankers, for the purpose of paying this bill, and it would be extremely hard to charge him interest for this money, when he was obliged to keep the sum lying in his hands without using it. In support of both points, viz. the necessity of a protest, and of a demand, they next cited *Lex Mercator*. 418. s. 30. 3 *Bac. Abr.* 614. 2 *Atk.* 611. *Powell v. Monier*. 2 *Str.* 1195. *Bishop v. Chitty*. *Gunning*. 93. cites 6 *Mod.* 10 *Mod. Saik.* 131.

It was further contended by them, that this bill of exchange would now be barred in *England*, by the statute of limitations there, more than six years having elapsed since the acceptance; and cited 2 *Str.* 733. to prove that when a man is discharged from an acceptance, by the laws of a foreign country, he cannot be sued here for the same debt. Upon the whole, they concluded, that as there was no protest, no demand of the bankers, *Brown and Collingson*, not even a demand proved upon the defendant himself, either in *England* or this country; and that as the plaintiff would now be barred there, by their statute of limitations; and that, in all cases, reference must be had to the laws of the country where the contract was to be performed;—for these reasons they prayed a verdict for the defendant; especially as far as related to the interest; but that, if they gave any interest at all, it could be only from the time of commencing the present suit, that being a legal demand.

*Pringle, Descaussure, and Ford, contra*, insisted, that neither a protest or demand was necessary, in order to entitle the holder to interest. And they laid it down as a position, “that between the acceptor and the payee of a bill of exchange, a protest is in no case necessary for any one purpose whatever.” To prove this, they resorted to the legal notion and operation of a protest. That the only purpose of it is to enable the holder of a bill to charge the drawer or indorser. That it never having been the intention of the plaintiff to charge the drawer in this case, he made no protest; and they admitted, that, if the present suit were against him, the want of a protest would be a bar.

They cited 2 *Bl. Com.* 469. 2 *Burr.* 674. *Ld. Mansfield's argt.* These, they thought, proved the position. They said there were some cases where interest and costs have been refused for want of protest ; but these were against the drawer, and upon inland bills of exchange, which depend on the stat. 9 and 10 *Wm. III.* and not on the common law. So are the cases in 2 *Stra.* 910. 1 *Stra.* 648, 9. They cited *Cro. Car.* 301. *Barnaby v. Rigalt.* 1 *Morg. Vad. Mec.* 55. 3 *Bac. Abr.* 612, 13. The objection being removed, they contended that interest was demandable of right. This being an acceptance, payable at a day certain, it was, they contended, a liquidated sum, and a definite assumption ; and compared it to a note of hand, payable at a certain day, which always carries interest from the day it is payable, whether there is a demand or not. So of liquidated accounts. That an acceptance is a complete promise; they cited 1 *Raym.* 88. *Doug.* 235. *Dingwall v. Dunster.* 1 *Esp.* 34. 42, 43. 1 *Wils.* 185. 2 *Burr.* 1083. 1085, 1086. *Robinson v. Bland*; where, they contended, the doctrine was conclusively applicable to the present case. 3 *Wils.* 205. 2 *Bl. Rep.* 761. 3 *Burr.* 1354. 1663. They contended that all these cases made the certainty of the sum, and of time of payment, the standard by which to estimate the time of drawing interest. As to the necessity of a demand, they alleged that it made no difference, unless the defendant had proved that he actually had the money lying in the hands of *Brown and Collingson* ; and that, as to a demand on himself, there could be no more occasion for it than in the case of a promissory note, payable two years after date.

As to the *British* statute of limitations, they contended that it could not be given in evidence, but must be specially pleaded. This is law, both here and in *England*. They admitted that, in general, foreign laws may be given in evidence, but that where any one law in that country must be specially pleaded, such law formed an exception, and must be pleaded here. Upon the equity of the case they also,

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lastly, contended, alleging that this bill was a substantial evidence of a debt, and that the plaintiff had been out of the use of the money, and had suffered, by the want of it, equally as much as though the debt had arisen upon any other mode of assumption. And, finally, that in all cases the jury ought to regard the equity of the case, and, as far as possible, in their verdict, compensate the injury which any party had sustained by the default of another.

RUTLEDGE, Ch. J. delivered the opinion of the court ; and charged the jury that a protest was not necessary to charge the acceptor with the principal, but that it was materially essential to charge him with the interest ; because it is evidence of a demand, which the court held to be necessary, in order to entitle the plaintiff to the interest.

The jury found for the plaintiff, dropping the interest antecedent to the time of commencing the suit ; but, previous to the verdict being known or read in court,

*Ford*, the attorney on record, thought proper to enter a nonsuit, in order that, in a future action, he might have an opportunity of proving the requisite demand, which he said would be in the plaintiff's power to do.

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READ *against* KENNEDY.

Where an appearance is entered for a defendant by an attorney, there is no occasion, afterwards, to serve a rule to plead on defendant. And if such attorney lives at a distance, so that the rule cannot be personally served on him, posting is sufficient.

THIS was a rule upon the plaintiff, to shew cause, on the *August return day*, why judgment, obtained in this case, should not be set aside for irregularity, upon the ground that the rule to plead was *posted* when the defendant was resident in the city.

And if such attorney lives at a distance, so that the rule cannot be personally served on him, posting is sufficient.



The writ was to *September* return, 1790 ; the sheriff returned personal service. On the back of the writ was endorsed an appearance by *Tate*, an attorney, who resides far back in the district of *Ninety-six*. The declaration was filed on the 26th of *March*, 1791 ; and the plaintiff's attorney not being able to serve the rule to plead upon *Tate*, by reason of his remote residence, on the 1st of *April* posted the same, as in a case where no appearance is entered. The rule was taken down and carried to Mr. *Harper*, another attorney, who, on the 2d of *April*, entered an appearance at the clerk's office, but filed no plea. At the expiration of the time limited to plead by the rule, (viz. 11th of *April*, 1791,) the plaintiff's attorney took an order for judgment, and on the last term, viz. on the 26th of *May*, 1791, executed his writ of inquiry. It appeared that the defendant had been allowed the usual imparlance, or indulgence, which was granted as a matter of course by the plaintiff's attorney, on the appearance being entered on the writ by *Tate*.

*Marshall*, for the rule, urged, that the rule of court requires personal service of the rule to plead on the defendant's attorney ; but it was answered, and agreed to by the court, that where the attorney lives at a distance, in the country, there is no other way to give him notice of rules, but by posting them.

It was then urged, that a rule is not to be posted where the defendant resides in town ; but the court resolved, that where there is an *appearance* by attorney entered, the plaintiff need take no notice of the personal residence of the defendant, nor need he communicate with him, but posting the rule will be sufficient.

It was lastly urged, by the defendant, that he had a substantial defence, viz. a discount, and that he was desirous of having an opportunity to avail himself of it ; but it was

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again answered, and resolved by the court, that he ought to have come in at the beginning of last term. That he should not be permitted to put the plaintiff to further delay, when there had been no surprise, and he had slipped all his opportunities.

*Per tot. Cur.* Let the rule be discharged.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURTS OF COMMON PLEAS**  
**AND**  
**GENERAL SESSIONS OF THE PEACE, &c.**  
**IN THE YEAR 1792.**

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**The Executors of LYNCH against HORRY.**

*January  
Term.*

ON a motion being made in this case to change the *venue* from *Georgetown* to *Charleston* district.

The case appeared to be, that in 1775, the defendant, together with *Benjamin Huger* and *Paul Trapier, jun.* since deceased, as commissioners of the high roads in *Prince George's* parish, contracted with *Thomas Lynch*, deceased, for making what is now called *Lynch's Causeway*, from *North* to *South Santee*, for which they engaged to pay him 8,000*l.* old currency ; which sum, by an old act of assembly, passed previous to the time of contract, was to be raised by a tax upon the negroes in *Prince George's* parish, which then comprehended the whole of the present district of *Georgetown*, except *Prince Frederick's* parish ; and the said commissioners were authorised, by the act, to make the assessment. *Lynch*, on his part, finished the *Causeway*, which was accepted on the part of the commissioners, in the year 1778 or 1779. The commissioners, however, owing to the confusion of the war, omitted to lay the tax, or

Where the inhabitants of a parish are liable to pay for repairing or making a causeway, they are interested in the suit respecting it, and therefore it is a good cause for changing the *venue*.

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collect the money to defray the expense ; and thus matters remained over till after the peace ; when this action was brought by *Bowman* and others, executors of *Lynch*, against *Horry*, the surviving commissioner, for recovery of the sum contracted for.

The suit was originally commenced in *Georgetown* district, and the present motion was to change the *venue* from that district to *Charleston* district, on the ground, that the parishioners of the former district were interested in the event of the cause ; and, therefore, an impartial or disinterested jury could not be impanelled to try the merits. The motion was founded on Mr. *Bowman's* affidavit, in which he swore, that the defendant had told him, he did not think a jury could be got in *Georgetown* district, who would find a verdict against him on this contract.

Two grounds of objection were taken against this motion : 1st. That the different districts were now independent of each other ; and, of course, no order made in one, should be binding, or have any effect, in the other. 2d. That even if the court had a power to change the *venue*, it was unnecessary, because a jury might be drawn from *Prince Frederick's* parish, who would be disinterested, impartial men.

*The Court.* No rule of law is better established than this, that when a fair trial cannot be had in one county or district, a *venire* must be awarded to an adjoining county. The books are full upon this point, and the principle of law is founded on wisdom and justice ; for, as a man cannot be a judge in his own cause, so a juror should not sit on one in which he is eventually interested. The smallest degree of interest, is a decisive objection to a witness, and much more so to a juror. 2 *Black.* 480. And as to the power of the court, it is a common law right, and the court is bound to grant it, unless taken away by some express statute. The old statute of *Richard II.* not being in force here, it stands upon the footing of the common law, unless altered by our local acts of assembly.

The first act which relates to the circuit courts, is that of 1769, which creates the districts, and authorises the holding of these courts. There is nothing in this act which takes away the right or power of the court. On the contrary, the 23d clause gives a power to the court to strike a special jury and try causes, either at bar, or at the circuit courts.

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The next act is that of 1789, giving those courts original and final jurisdiction. The preamble is the best key to it. It recites "the inconvenience of writs and processes being issued from and returned to *Charleston*." Then it goes on, and gives the several circuit courts the same powers as to the matters therein mentioned, as the court of common pleas at *Charleston* enjoyed. And the 15th clause expressly reserves the right of applying for new trials, &c. as usual; which shews that the controlling power of the judges at bar, as to all matters of law, was never intended to be taken away by the act of 1789.

The new constitution expressly requires, that the judges shall, after the conclusion of the circuits, meet at *Columbia*, to hear motions for new trials, in arrest of judgment, and such other points of law as might be submitted to them; then to adjourn to *Charleston* for the same purpose. So that this power of the judges in superintending the administration of justice throughout the state, seems to be specially reserved by the constitution. The court, therefore, has no doubt as to its power to grant the motion. With regard to the second objection to this motion, there is no weight in it; for, as the law stands now, a jury cannot be drawn from *Prince Frederick's* parish. The sheriff is bound to draw the jury out of the *district* jury-box, and the first thirty drawn, are to serve: so that it may happen, that not one man may be drawn from *Prince Frederick's* parish. And in cases of special juries, each party has a right to give in his own list. Let the rule, therefore, be made absolute for changing the *venue* to *Charleston* dis-

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trict: where the cause was afterwards tried, and a verdict found for the plaintiffs.

*Pinckney and Pringle*, for the motion:

*Trezevant*, against it.



*Ninety-six*  
*District,*  
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JOHNSTON and HENDERSON *against* DILLIARD.

A parent permitting a negro girl slave to go with his daughter on marriage, and to remain several years afterwards in possession of the young married couple; this is to be considered as a good gift in law; although there be no deed of gift in writing, nor any formal delivery of such slave. Any deed of manumission, therefore, of such negro afterwards, by the father, under pretence of its being only a loan to the married couple, to be deemed null and void.

SPECIAL action on the case, in nature of ravishment of ward, to try the freedom of a negro female slave called *Miley*, and her children.

The plaintiffs in this action were of the society of the people called Friends or Quakers, and had taken uncommon pains to procure this wench and sundry others, their freedom. It was stated and admitted at the trial, that *Johnson's* zeal on this and other like occasions, had induced him to ride near 10,000 miles at different times, in order to establish the freedom of a number of negroes, held in slavery in this state and in *Georgia*; and that he was supported in this arduous undertaking, by a society, or societies, formed in the northern states for that purpose.

In support of the action, a deed was produced from one *Charles Moorman*, formerly of *Virginia*, deceased, who was one of the Society of Friends in that state, bearing date the 28th of *May*, 1778, in which he manumits or sets free, a number of his negroes, and among others, the wench *Miley*, after she should arrive at the age of 18 years. His last will and testament was next produced, bearing date the 2d of *September*, 1778, proved and authenticated under the great seal of the state of *Virginia*, in which he *lends* to his children, his male slaves until they should arrive at 21 years of age; and the females, until they should arrive at 18 years of age; then to be free. An act of the state of *Virginia*

was next produced, under the great seal of that state, passed the 27th of *August*, 1788, giving a legal sanction to the deed of manumission, and last will and testament of old *Moorman*; saving, nevertheless, the *rights of individuals*, who might have a *legal claim* on any of the negroes in question.

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Several witnesses were called on behalf of the defendant, who in substance proved, that in the year 1669, one *James Taylor* married *Mary*, one of the daughters of *Moorman*; and that soon after, when they left her father's house and went to house-keeping, the wench in question, then a girl, was permitted to go along with his daughter *Mary*, who took her home with her. That he also gave to his other children as they married, a negro each. That after remaining several years in their possession, to wit, till some time in the year 1778, *Taylor* and his wife sold the wench in question to the present defendant.

*Ramsay* and *Carnes*, for the plaintiffs, argued in substance, that although *Moorman* permitted this girl, *Miley*, to go with his daughter, in the manner stated by the witnesses; yet, he never made any *gift* of her. That to constitute a gift in law, one of three things was requisite: first, either a *formal* instrument of writing, giving away the property; or a *parol* gift, in the presence of witnesses; or a *personal delivery* over, of the property to the use of the donee; neither of which had been done in the present case. That the property still remained the property of *Moorman*, and subject to his disposal, although he had lent the services of the girl to his daughter for several years. That no property ever vested in *Taylor* and his wife; consequently, they could not sell: of course, it followed, that *Moorman* always retained the property, and a controlling power over the wench, and had a right to set her at liberty, or otherwise dispose of her, as he thought proper.

*Calhoun* and *Desaussure*, for the defendant, contended, that this gift was in consideration of marriage; and as such, the highest consideration known in law. That wherever

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property of any kind, had been permitted to go along with a new married couple, upon their marriage, it had always been held sacred; therefore, any attempt by a father afterwards, to reclaim such property, was an act which came with an ill grace indeed into a court of justice; and particularly, when it had remained near nine years in the possession of *Taylor* and his wife. There could be no doubt but that *Moorman* had a right in 1778, to manumit all such negroes as he held at that time; but surely, none that he had previously disposed of, or suffered to go along with his children. And the wisdom of the *Virginia* assembly was obvious, in their act to confirm the manumission, by inserting a clause, reserving to individuals their rights; which evidently referred to any disposition of those negroes, previous to the act of manumission.

It had, however, they said, been objected on the part of the plaintiffs, that there had been no formal gift, either by deed, parol, or delivery, in this case; therefore, the property never vested in *Taylor* and wife. To this they answered, that it had been a uniform rule of law in this country, from time immemorial, that whatever property went to a woman upon her marriage, by and with the consent, knowledge and approbation of her father, was considered as given to her as her marriage portion, or part of her portion; and our courts of justice had never permitted it to be called in question. This consent and approbation of the father, was as good as a thousand deeds of gift; for it could not be conceived that a father would permit the property to go along with his daughter, unless he intended to give it her; otherwise it would be a kind of fraud on the husband, who might contract debts, and upon others, who might be induced to give him credit, on the faith of such property being the property he gained in marriage.

BAY, J. in charging the jury, told them, that marriage was certainly the highest consideration known in law; and whatsoever passed to a daughter on her marriage, by the consent and approbation of her father, was not only consi-



dered in law as a good gift or transfer, but it was so even against creditors, unless done with a fraudulent intention. No gift could be more formal, than to permit property to go off with a daughter on marriage; and our courts had uniformly given such gifts the highest possible sanction. In the present case, the wench in dispute had not only gone over on the daughter's marriage, but had afterwards been nine years in her possession, before *Moorman* made the deed of manumission, offered in evidence. This was certainly such a confirmation of the original gift, as would not permit the property to be called in question at this distant day. The length of possession alone, independent of the consideration of marriage, was such an acquiescence on the part of *Moorman*, that under *our act of limitation*, it would have barred him of any claim to the wench. That under these circumstances, therefore, the deed of manumission was utterly void in law, as far as it related to the wench now in question.

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Verdict for the plaintiff.

N. B. This point has been ruled over and over again in our courts of justice, and therefore may be considered as the settled law of our state.

FANNEN *against* BEAUFORD and TILLMAN.

Ninety-six  
District,  
April Court,

DEBT on bond, for the performance of covenants, &c. In the performance of covenants, it is a maxim, that he who prevents a thing; The bond was dated in *December*, 1779; the penalty, 100,000*l.* It was given for a plantation on the east side of from being done, shall not avail himself of the non-performance; and where there are reciprocal duties to be performed by the parties he who alleges a breach ought to shew he was always ready and willing to perform what he was obliged to do; otherwise he shall not be permitted to come into court and take advantage of his own laches or neglect.

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*Broad River*, valued at 1,450*l.* old currency, and was conditioned for the delivery of a negro man, *Jack*, value 600*l.* another negro to be valued by three indifferent persons, in *April*, 1781, and the residue in horses, to be taken also at a valuation.

To this the defendant pleaded *performance* in part, and that he was prevented from performing the residue of the covenants, by reason of the plaintiff's absence from the country, so that the defendant could not perform.

Testimony was then produced, which proved, that the negro, *Jack*, was delivered agreeable to contract, but that the plaintiff shortly after joined the enemy, was taken prisoner by the *American* troops and sent into *North-Carolina*, and did not return again, so as to be publicly known, till 1791; and that it was the general report, that he was absent from 1780 till 1791.

On the other hand again, testimony was given on the part of the plaintiff, that his wife remained in that part of the country, and that he occasionally came to see her, but did not appear in public, on account of the part he had taken with the enemy; and that his brother, *James Fannen*, was his reputed agent.

It further appeared in evidence, that the defendant, *Beauford*, often inquired for this bond; said he was ready to pay it off; and in 1789, went to the plaintiff's brother, who he understood had a letter of attorney from the plaintiff to receive it, demanded a settlement and said he was ready to pay it off; but that he did not produce the bond, or letter of attorney, or appoint any place to value the negro or horses mentioned in the bond. The dispute in this case was respecting the interest on the bond, between the year 1779, and the day of the commencement of this suit in 1791.

For the plaintiff, *Fannen*, it was urged, that it was the duty of the defendant to have gone and *tendered* what was due on this bond, before he could pretend to set up this defence against the demand of the interest; and as no such tender was made, or refused, he was certainly liable. They admitted that the defendant did go to the plaintiff's brother,

who was his agent, and demanded a sight of the bond, and that he said he was ready and willing to pay it off; but that he made no offer of a negro and horses, agreeable to the terms of the condition of the bond. A bare demand of a bond, and a declaration that the party is willing and ready to pay and satisfy, was no tender at law, without an offer of the property. It amounted to no more than loose, vague parlance, which could not debar the plaintiff of his legal right.

For the defendant, the counsel insisted, that there was a wide difference between a tender and performance of covenants. In the one case, where money is to be paid, it is the duty of the obligor to go and tender the money really due, and this he must do at his peril, otherwise the interest will run on. But with respect to the performance of contracts, it is different. In such case, the maxim is, that he who *prevents* a thing from being done, shall not *avail* himself of a *non-performance*, occasioned by his own act. *Doug.* 659. 669. They also argued, that where bulky articles were to be delivered, there was no occasion to carry them about. It is sufficient to go and inquire where the party will have them delivered. 5. *Bac. tit. Tender.* In the present case they said it was the plaintiff's own fault to leave the country, or to place himself in a situation, which rendered it necessary for him to be absent from it. That he was not in *Carolina* on the 1st of *April*, 1781; had left no known agent to transact his business; therefore, it was impossible for him *then* to perform his covenant. From the very nature of this covenant, it was indispensably necessary, that both parties, or their agents, should be present, for there were reciprocal duties to be done, before this covenant in *April*, 1781, could be performed. A negro and horses were to be taken at a valuation, each party was bound to choose an appraiser to set a value on this property, and in case of disagreement, these two were to appoint a third person. Without the presence, therefore, of both parties, or their agents, this covenant could not be performed. That as soon as *Beauford* heard of an agent, (which did not

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appear to be till 1787,) he went to the plaintiff's brother and demanded a sight of the bond and letter of attorney, and offered to settle; but that the agent shewed neither, nor did he appoint any time to value and appraise the negro and horses, agreeable to the terms of the contract; that the defendant was under no obligation to carry negroes and horses about with him through the country, searching for this bond, &c. He had a fixed residence, was well known, and it was easy for the other party, either to have gone to his house, or appointed some convenient place, in the neighbourhood, to have valued and received this property in satisfaction of the bond. But as he did not do so, and as, moreover, the plaintiff himself never appeared, he ought not, at this day, to be permitted to come in and take advantage of his own absence, neglect or delay.

BAY, J. Where money is to be paid, the obligor is to tender it at his peril; but in cases of mutual covenants, where there are reciprocal duties to be performed by each party, there the party alleging a breach, ought to shew that he was always willing and ready to perform what, on his part, he was obliged to do. But if, on the contrary, he is not ready, or if he be the means of preventing it from being done, he shall not be permitted to come into a court of justice, and take advantage of his own laches or neglect. Even in cases where the covenants are not reciprocal, as where bulky or heavy commodities are to be delivered, the covenantor is not obliged to carry them about with him. It is sufficient if he inquire, and request of the other party, to know where he would wish to have them delivered; and if he refuse to point out a place for their delivery, it is his own fault. From these principles the jury must judge of the case. If the plaintiff had been ready on the 1st of *April*, 1781, and always since, to receive the property mentioned in the condition of the bond, and also to have nominated an appraiser, to fix a valuation on them; or if he had nominated an agent for that purpose, who had also been ready, then there can be no doubt but he would be entitled to a verdict for the whole amount of principal and interest. But, on the

contrary, if they shall be of opinion that the plaintiff was not ready on the day the contract was to have been performed, or at any time since, or that he had left the country without appointing an agent to act for him, or if that agent was not known to the defendant, then it is clear that he himself was to blame, and he is obliged to take the consequences. Even if he had left an agent—if such agent, so many years after the time fixed for performance had expired, had not appointed a time and place for performance, still the blame must rest on his shoulders.

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The jury returned a verdict in favour of the plaintiff, for \$500. old currency.

*Carnes and Harper*, for plaintiff.

*Desaussure and Ramsay*, for defendants.

#### Lessee of TARRANT against TERRY.

Ninety-<sup>th</sup>  
District,  
April Court.

**EJECTMENT** to try title to 149 acres of land. The plaintiff claimed under a grant to himself, dated the 6th of April, 1789, which included a mill-seat on a fine stream of water, on which a mill had lately been erected by him, at a considerable expense. The defendant, *Terry*, claimed under an elder grant to one *Lewis*, dated the 16th of July, 1784, for 640 acres, which, it was alleged, ran so low down the creek as to include this mill, which, in fact, was the object of the contest.

It appeared, in evidence, that both these tracts of land had been run out by *Lewis* himself, who was a deputy-sur-

A surveyor running land, and bounding it on one of the lines of a tract of his own, admits that the land was vacant up to his line at the time of the survey. And he shall not afterwards be suffered to extend his lines so as to include a mill-seat on the tract adjoining his own;

as such transaction is founded in fraud, which will vitiate his grant *pro tanto*.

His afterwards standing by and seeing his neighbour build a mill on such mill-seat, without giving him notice of his claim, amounts to a forfeiture of his right, though there had been no fraud in extending such lines.

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veyor ; and that at the time the small tract of 149 acres of land was run out, he was not apprised of the mill-seat ; but soon after, upon discovering the mill-seat, he extended the lines of his own tract so far down as to include the mill-seat. *Tarrant*, however, not being apprised of *Lewis* having extended his lines so as to include the mill-seat, and, being a poor man, rested contented under his survey till it suited him to take out his grant, which was not till 1789, near five years after the date of *Lewis's* grant, on which he shortly after built the mill which was the object of this suit.

The question, therefore, was, who should have the mill ; *Lewis*, who had included the seat in the elder grant, or *Tarrant*, who had it included in his younger grant ?

*For the defendant* it was urged, that *Lewis* had the eldest grant. That from the face of the plot it appeared that the mill-seat was included in it. It was matter of record, and there could be no averring against it. *Tarrant*, before the passing of the grant, might have had good grounds for going into a court of *caveats*, and contesting the right, but as it had passed the great seal, it was too late.

*For the plaintiff* it was replied, that it never was too late to rectify a fraud. The conduct of *Lewis*, who was a public officer, was an absolute fraud, practised upon *Tarrant*. As to his grant passing under the great seal first, it was obtained through fraud ; therefore it ought to be set aside, as far as it affects *Tarrant*. They urged, that it was one of the great branches of the jurisdiction of a court of chancery, to set aside letters patent obtained through *fraud*, or false pretensions ; and if a court of common law could come fairly at the facts, it was as competent to that purpose as a court of equity. They then contended that *Lewis* being a public officer, he was sworn to do his duty faithfully. That at first he did his duty, by running out his own tract of 640 acres, which was bounded on the lower side, at that time, by *vacant* land. He then ran out *Tarrant's* small tract of 149 acres, and bounded it on the upper side on his own tract of

640 acres, which plot was afterwards returned into the surveyor's office, and is now annexed to *Tarrant's* grant. By this plot of *Tarrant's* he admitted, that the land was vacant up to his own line, which he had laid down, and which, unquestionably, included the mill-seat. To attempt, therefore, to alter lines and plots afterwards, or the location of the land, without the consent of *Tarrant*, was a breach of duty, and such a fraudulent conduct as a court and jury would not sanction. But what made the conduct of *Lewis*, under whom the defendant claims, still worse, was his standing by, living in the neighbourhood, and seeing *Tarrant* erect a mill, without once giving him notice that the land was included in his survey, until the mill was completely finished. This the counsel compared to the case of a man who stood by and saw another build on his land, without warning him of his error, where it was held, in equity, that he should lose his land for his fraudulent neglect.

BAY, J. said, that it appeared to him, that the conduct of *Lewis*, in the first instance, was fraudulent, in the manner and for the reasons stated by the plaintiff's counsel. That if the jury should be of the same opinion with him, they might consider *Lewis's* grant (although the first) *void* as far as it affected *Tarrant's* survey. That with respect to the subsequent conduct of *Lewis*, who was in the neighbourhood, and saw *Tarrant* erecting his mill, under an impression that the land was included in his grant, without once hinting that the land was his, or forbidding him from going on, was, of itself, such a conduct, even if there had been no fraud in the survey, as would have forfeited his claim to the land in question.\* Therefore, in either point of view, whether the jury consider the fraud in the survey, or the

\* See this doctrine maintained by Lord Chancellor *Hardwicke*, 2 *Atk.* 83. *The East-India Company v. Vincent.*

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culpable neglect or omission afterwards, the plaintiff was certainly entitled to a verdict.

The jury found a verdict accordingly.

*Desaussure and Calhoun*, for plaintiff.

*Ramsay and Carnes*, for defendant.

A new trial was afterwards had by consent, when a second verdict confirmed the title of the land in the plaintiff.

*May Sessions.*

The STATE against SELF.

If an hostler, who has the care and charge of a horse, take him with an intent to convert him to his own use, it is felony. Otherwise, if he only take him to use him, and then return him again; in the latter case, it is only a breach of trust.

THE prisoner was indicted for horse-stealing. It appeared in evidence, that he was a hostler to Mr. *Tims*, innkeeper at the *Ten-Mile House*, and that in the night time, he went off, and took with him the horse.

On behalf of the prisoner, it was contended, that this was only a breach of trust, and not a felony; because he had the care and charge of the horse, and by this means gained a possession by the consent of the owner; consequently, there could be no felony committed, as he came legally and fairly into the prisoner's custody.

*The Court.* The intention of the prisoner in taking the horse, is a matter for the consideration of the jury; whether it was done *animo furandi*, or not? As to the law, it is clear that the bare charge or care of a horse, does not change the legal possession out of the master. If the prisoner took him away with intent to steal or convert him to his own use, it is felony; notwithstanding he had the care of him as hostler. But it is only a breach of trust, if he take him to use him, and then return him again. 1 *Hawk.* 90. 1 *Hale's P. C.* 505, 506:



The Administrators of *ASH* against the Executors of *May Term.*  
*BREWTON.*

THIS cause was tried before a special jury. Mr. *Champneys*, in 1775, drew an inland bill of exchange on the deceased Mr. *Brewton*, for 300*l.* currency, and upwards, in favour of *Ash*, payable at fourteen days, which bill *Brewton* accepted, being for two casks of indigo sold to *Brewton* by *Champneys*. It did not appear that any protest had ever been made for non-payment, or even any demand made for the money ; but there having been mutual dealings between *Brewton* and *Ash*, the matter laid over as an article of account between the parties till they both died, and until the present suit was commenced.

Interest is allowable on an accepted bill of exchange, against the acceptor ; tho' no protest ; where there is no special acceptance.

*Parker* objected to the allowance of any interest until after suit brought, on an inland bill of exchange, accepted by *Brewton* in his life-time. He rested his objection on the authority of the case of *Lang v. Brailsford* ; (a) and contended, that a protest was necessary, or a demand ought at least to have been proved, to entitle the plaintiff to interest.

(a) *Ante*, p. 232.

*Pringle*, in reply, said that the acceptance in the case of *Lang v. Brailsford*, was a special one. The bill there, was drawn by *Powell, Hopton & Co.* at two years sight, and accepted by *Brailsford*, payable at the house of *Brown & Collingson, London*. This, therefore, was such a special acceptance, as made the demand on *Brown & Collingson* absolutely necessary, when the bill became due, or a demand of *Brailsford* after it became due ; neither of which was proved in that case. This case, therefore, was widely different. Here was no special acceptance ; payable at no particular place ; but was unconditional and transitory, always attached to the person of the acceptor.

The Court (present, *WATIES* and *BAY*, Justices) were clearly of opinion that interest ought, in this case, to be

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Brewton.

recovered from the day that the bill became payable, though *no protest was made*, or *demand* proved. For a protest is only necessary, in order to entitle the *payee* to damages against the *drawer*. *Gen. Law of Bills of Exchange*, 29. That the drawee is the original debtor after acceptance. 2 *Burr.* 674. The drawer is only liable on his default. That in this respect, it might be compared to a note of hand, payable at fourteen days ; in which case, interest was clearly recoverable from the day the money became due. That Lord *Hardwicke*, in 2 *Atk.* 611. had settled the principle, which had never been shaken or questioned since.

They were also of opinion, that the special circumstances in the case of *Lang v. Brailsford*, made it very different from the present case. For, where a bill is made payable, or accepted to be paid at a particular banking-house, there the party ought to resort for payment, when the bill becomes due, by the custom of merchants, before interest or damages can be recovered from the acceptor ; otherwise, the funds which might be placed in the hands of such banker, to answer such draft, might lie useless, without the acceptor's knowing whether the money was called for or not.

*The Jury* found a verdict for the plaintiffs, with interest from the expiration of the fourteen days, mentioned in the bill, to the time of verdict,

The STATE *against* FULLER.

May Sessions.

FORGERY of a promissory note. The jury in this case, found the prisoner "*guilty of attempting to pass the note, knowing of the forgery.*"

Upon the adjournment day, the counsel for the prisoner moved in arrest of judgment, that this was not *such a finding* as would warrant the court to pass sentence against the prisoner; inasmuch as the verdict did not state or find that the prisoner passed the note, knowing of the forgery, *with intent to defraud*. And upon this ground, it was contended, that the felony was not found *complete*; and that the court could not, by *intendment*, supply the fraudulent intention, so as to affect the life of the prisoner.

If a special verdict states the passing of a forged note, knowing of the forgery, it is sufficient to warrant a judgment on the conviction, though such finding does not express that it was done with a fraudulent intention; for the fraudulent intention springs out of the knowledge of the forgery, as a natural consequence.

*The Court*, after argument, and upon mature deliberation, were of opinion, that the verdict, as it stood, would warrant the passing of sentence on the prisoner; upon the authority of Lord Holt, 12 Mod. 627. who lays it down, that though in an indictment for manslaughter, it is necessary to lay it to have been done *voluntarily*; yet it is not necessary, that it should be found so in a special verdict; for if it be found that the prisoner *did the act*, without any more, it must be understood that he did it voluntarily, as laid in the indictment, *if the contrary do not appear*. So also in 2 Str. 844, 5. where a verdict found that a prisoner *forged a bond and published the same*; but no intention to defraud. The court had no doubt but that it was a good finding to constitute the forgery. So again in Donnelly's case, Leach, 204. It is laid down in a case of robbery, the putting in fear (which is essential to a robbery) need not be *laid* or *found*; but if it be laid, and found to be done violently and against the will, the law, *in odium spoliatoris*, will presume it; that is, that the person was put in bodily fear. A reasonable fear of violence, caused by a constructive violence, is sufficient; so resolved by all the judges of

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Fuller.

*England*, in their opinion delivered by Justice *Willes*, in *May*, 1779.

In the present case, the indictment states, *that the note was passed, knowing of the forgery, with intent to defraud.* The verdict finds the *uttering, knowing of the forgery.* The facts which constitute the offence, are here found. The intent is only matter of circumstance, which naturally follows and springs out of the facts. No other than a *fraudulent* intent can be inferred, when a man makes or passes a false deed, as and for a true one. The law will presume as in the foregoing cases, (*in odium fraudis*,) that it was done with a fraudulent intention. Besides, it is laid down in *5 Rep.* 97. that the court will never entertain a doubt concerning a thing not submitted to them by a special verdict; but, on the contrary, will intend every thing, which can be fairly intended, in order to support the verdict.

Present, BURKE, GRIMKE, WATIES, and BAY, Justices.

The motion was discharged, and the prisoner afterwards executed.

May Term.

NEWMAN against CROCKER.

DEBT on bond, dated the 11th of *October*, 1786. Discount pleaded. It appeared that this bond was assigned to Mons. *Desverneys*, in *February*, 1788, and that the defendant had then notice of the assignment. The transactions offered in discount, between the present plaintiff and defendant, were all subsequent to the time of the assignment and notice. But

*By the Court.* This discount cannot be allowed, because the transactions are all subsequent to the time of assignment and notice. The property in the bond was then transferred out of the plaintiff. He is now only a mere nominal plaintiff, made use of by *Desverneys*, the holder of the bond, for the purpose of recovering from the obligor. *Newman* could not even release the action, for the assignment itself imports a covenant that the assignee shall bring the action in the assignor's name, and recover and have the money to his own use. 11 *Mod.* 171. The equity in favour of an obligor, can never be carried down further than the assignment and notice. So that if payment were afterwards made to the obligee, it would be at the risk of the obligor; and he would be obliged to pay it over again to the assignee.

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v.  
Crocker.

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WHITE against EAGAN.

May Term.

ACTION of trespass, to try title to lands, and for damages, &c.

*The Court*, in this case determined, that parol testimony might be given in evidence, to explain the situation of land, contrary to the face of the deed; if it is evident from the nature of the thing itself, that there is a mistake in the deed, as where *north* is mentioned for *south*; or *south* for *north*, *et vice versa*, &c. The land in question being described in the deed to bound on Sir *John Colleton* to the *north*, and one *Cox* to the *south*; whereas, in fact and in truth, it did really bound on *Cox* to the *north*, and on Sir *John Colleton* to the *south*.

Parol testimony may be admitted to explain the situation of land, although contrary to the description in the deed; if a mistake is apparent from the nature of the thing itself.

*May Term.*

M'KENZIE against MILLIGAN.

Where *son assault demesne* is pleaded, the defendant becomes plaintiff in the action, and has a right to open and conclude his case.

**ASSAULT.** On justification and *son assault demesne*, pleaded in this action.

*Holmes*, for defendant, admitted he struck, but contended that the plaintiff struck first, which was a fact tendered to the jury by the defendant, and that he ought to be considered as plaintiff in the action, and of course, had a right to open and conclude the case.

After hearing counsel, the court resolved, that as the defendant made himself, by his plea, the plaintiff in the action, he had a right to proceed and open his case, call his witnesses and conclude it. 2 *Lill. Pract. Reg.* 523. tit. *Son Assault*.

*May Term.*

THOMPSON and Wife against The Executors of YOUNGBLOOD.

It is not the duty of an executor, to search out the legatee, or other person, entitled to a share of an estate. It is enough, that he is always ready, when called upon, to pay it.

**THIS** was an action brought in right of Mrs. *Thompson*, for her share of her grandfather, *Samuel Snee's* estate. It appeared that the executor of *Snee* made sale of the effects of the estate, and closed the accounts some time in the year 1778; and always kept the money by him, to pay over to those entitled to a distributive share, whenever they should think proper to call for it. The money remained in the executor's hands till it became so much depreciated, as to be worth little or nothing. So that the only question was, who should bear the loss, the plaintiffs, or the executor?

For the plaintiffs, it was said, that if the executor had paid over this money in 1778, as soon as he received it, it would have been valuable, as paper money had not then ex-

perienced a great depreciation; and, therefore, as the executor thought proper to keep it, he ought to sustain the loss.

On the other hand, it was answered, that the money was ready always in the executor's hands, and would have been paid on demand. That a legatee, or person entitled to a distributive share of an estate, was bound in law, to shew his right, and make a demand. It was not the duty of the executor to search out the person so entitled, and make a tender, as if he were an original debtor.

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and wife  
v.  
The Ex'rs of  
Youngblood.

*The Court* (present, RUTLEDGE, Ch. J. BURKE, and BAY, Justices) were clearly of opinion, that it was the duty of a legatee, or other person claiming a legacy, or distributive share of an estate, to make his claim of the executor, and shew his right to receive, before such executor could legally pay over. There was no obligation on the part of the executor, to search out the legatee; it was enough that he was always ready, when called upon, to pay it.

Verdict for defendants.



BELL *against* The Administrators of WOOD.

May Term.

THIS was an action of *assumpsit*, by the indorsee, against the administrators of the drawer of a promissory note.

It came out from the evidence in this case, that *Wood*, the drawer of this note, had, in his life-time, driven to margined in turpitude; as much so as a note given on a usurious or gambling contract.

An indorsement after it is due, independent of the foregoing considerations, will permit the parties to go into the consideration of it in the hands of an indorsee, as well as if it had remained in the hands of the original payee.

A note given to compound a felony, is void by the common law, in the hands of an indorsee, because originally found-

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Wood.

ket, eleven hogs belonging to one *Warren*, his neighbour ; and upon his return home, *Warren* had him taken up for hog-stealing, and taken before a magistrate. When he appeared before the magistrate, he recommended a compromise between the parties, at the same time telling *Wood*, if he would not settle with *Warren*, he should be taken to gaol. *Wood*, to avoid going to goal, accordingly complied, and gave the note in question, for 27*l.* 10*s.* being one-half of 55*l.* the sum he would have been compelled to pay, had he been convicted of *hog-stealing* in the court of sessions, (or have suffered the punishment of thirty-nine lashes,) agreeable to the act of assembly in such case made. This note came into the hands of the indorsee, the present plaintiff, upwards of a year after it had fallen due.

*Marshall* and *Hall*, for the defendants, took two grounds ; first, that this note was *extorted* from the defendant's testator, by *duress*. Secondly, that it was given on an *illegal* consideration, and therefore void by the common law. And if void in its original creation, no subsequent indorsement could give it validity, so as to charge the drawer, or his representative. That the indorsee could not have a greater or better right than the original *payee* had ; and if the *payee* could not have recovered on this note, the indorsee could not. Besides the note was indorsed after it became due, and therefore subject to every defence which the original *payee* might have set up.

*Pringle*, contra, argued that there was no *duress* in the transaction, because there was evidently a debt due from *Wood*, to the amount of the value of the hogs ; and it was lawful for him to make satisfaction to *Warren* for them, even before the magistrate. But whatever the consideration of this note might have been, there was no *privity of it, brought home to the indorsee, the present plaintiff*. And were such a doctrine, as that contended for by the defendants, to prevail, and be admitted, it would tend in a great measure, to *destroy the negotiability of notes and bills of exchange, &c.* That nothing could affect notes and bills in the hands of an innocent indorsee, except they were found.



ed on *usurious*, or *gambling* contracts, or transactions ; and these were expressly rendered void by statute. *Doug.* 636. 640.

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strators of  
Wood.

BAY, J. Had the proceedings of *Warren* against *Wood* been of a *civil* nature, for the value of the hogs only, and a compromise had taken place between the parties, it would not have been *duress*. But as it appears to have been a criminal proceeding for felony, and the note in question given to compound that felony, and to avoid going to gaol, it is *void by the common law*. All contracts made to compound felonies, or to prevent the due execution of the law, by the connivance of magistrates, sheriffs, or other officers, are void. *Powell*, 186. 3 *Burr.* 1675. The circumstance of this note being in the hands of an indorser ignorant of the original transaction, makes no kind of difference ; for, being void, in its original creation, for *illegality* and *turpitude*, it can never afterwards be valid, so as to charge the drawer. Some notes are void by the *common* law, others made so by *statute* ; there is, however, no essential difference between them. They are in both cases equally void, and without any binding efficacy on the part of the drawer. If, then, they are so, no good reason can be assigned why the holder of a note, made void by the common law, should recover, any more than the indorsee of a note made void by the statute. In all these cases the common law and statutes hold the same powerful language ; to wit, that they *never had a legal existence*. Could a doubt, however, arise on this ground, yet, the last one taken by the defendant's counsel ; is conclusive. Being *indorsed a year, after it became due* : this is a circumstance which carries with it a suspicion of the fairness of the transaction, and is sufficient to throw it *out of the course of trade* ; in which case the indorsee takes it upon the credit of the indorser, and must therefore stand in the situation of the person to whom it was originally payable. And the drawer may offer in evidence any circumstance, which might be given in evidence, to impeach

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The Admini-  
strators of  
Wool.

the consideration, or shew that it was illegal, in the same manner as if it had remained in the hands of the payee.

Jury found for the defendants.

*Pringle* gave notice that he intended to move for a new trial, on the ground of misdirection in the judge, in point of law, but never brought the motion forward ; consequently, acquiesced in the determination.

BOWMAN and others, Devisees of CATTEL, against  
MIDDLETON.

An act of assembly, passed in 1712, transferring a freehold from the heir at law of one *Nicholls*, and also from the eldest son and heir of *John Cattel*, deceased, and vesting it in a second son, *William Cattel*, without a trial by jury, considered as null and void, and that the descendants of *William*, the second son, could claim no title under such an act, being against common right and the principles of *magna charta*.

THIS was an issue directed from the court of chancery, and tried by a special jury at *Charleston*, and was the second trial (that court having, on account of some alleged mistake, directed a new trial) in order to ascertain the location of a tract of land; situate on *Ashley* river, which the defendant had purchased at the sales by the master in chancery, of the estate of *Cattel*, and sold for 490 acres.

The land in question had been sold by virtue of a decree of the court of chancery ; at which sale the defendant, *Middleton*, became the purchaser ; who soon after discovered (as he alleged) that the lines of several elder tracts ran into it, and, by that means, took off so considerable a portion of it as to defeat, in a great degree, the main object he had in view at the time of the purchase, that of making an extensive settlement on it. The master in chancery soon after laid him under a rule to shew cause why he did not comply with the conditions of the sale, and give his bonds for the purchase-money, when he assigned the foregoing reason as the ground of his non-compliance.

The devisees of *Cattel*, in support of the rule, insisted that the defendant had the whole of the land sold him, and

that there was no deficiency in the quantity. The present issue was, therefore, sent down to ascertain, by the verdict of a jury, whether there was any, and what deficiency in the land in question? And, in the decretal order, it was directed, that the devisees, who were defendants in equity, should be plaintiffs at law; and *Middleton*, who was the complainant, should be the defendant; in order that they might recover by the strength of their title, and not turn round the present defendant, *Middleton*, to combat the right with the supposed elder grantees. The land sold, consisted of sundry small tracts, which had been purchased or run out by *John Cattel*, the ancestor of the plaintiffs, or acquired by length of possession. The evidences were numerous, and examinations lengthy, on both sides; but they chiefly went either to confirm or defeat boundary lines, or to establish or destroy a right by possession; all of which was very proper for the consideration of the jury, to whom they were ultimately submitted.

The only point of law of any importance which occurred in the course of the trial, was a title, set up under an act of assembly passed so long since as in the year 1712. From the ancient grants and papers produced, it appeared, that in *August*, 1677, one *Roger Nicholls* obtained a grant for 510 acres of land on *Ashley* river. That in 1701, *John Cattel*, the father of *William Cattel*, (under whom the plaintiffs claimed,) obtained a grant for 240 acres, on *Ashley* river, adjoining *Nicholls's*; but, from the examination of the plots, it appeared that the grant to *John Cattel* ran into *Nicholls's* land so far as to include 146 acres of his tract. *John Cattel* soon after died intestate. In 1712 an act was passed confirming the right and title of *John*, *William*, *Benjamin*, and *Peter*, sons of *John Cattel*, deceased, and *John*, a minor grandson of old *John Cattel*, of, in, and to, sundry tracts of land, in the said act particularly mentioned; and, among others, this tract of 240 acres on *Ashley* river, which had been run out by old *John Cattel*, in 1701, was confirmed to *William Cattel*, the second son, his heirs and assigns for ever. Under this act, therefore, the plaintiffs claimed 240 acres of

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the land in dispute, being part and parcel of the 490 acres sold.

*For the defendant*, an objection was taken by his counsel, that no title could be transferred by this act. That it was against common right and reason as well as against *magna charta*; therefore, *ipso facto*, void. In the first place, it went to deprive the heir at law of *Nicholls* of 146 acres of land, without being called upon to answer or defend his title; and that too without the intervention of a trial by his peers. In the next place, it went to deprive the eldest son of old *John Cattel* of his inheritance, (his father dying intestate,) by settling the estate in *William*, the second son. So that, in fact, it wrought a two-fold injury, by depriving the heir at law of *Nicholls* and the heir at law of *Cattel* of their freeholds, without a trial by jury. They admitted that there might be great and urgent occasions wherein it might be justifiable for the state to take private property from individuals, (upon a full indemnification,) for the purposes of fortifications or public works, &c. but in no case could the legislature of the country interfere with private property, by taking it from one man and giving it to another, to the prejudice of either party, or that of third persons, who might be interested in the event. That the courts of justice were always open to give redress, and determine on the right; and that these courts were the proper tribunals to apply to for redress in such cases.

This point, without further argument, was submitted to

*The Court*, (present, GRIMKE and BAY, Justices,) who, after a full consideration on the subject, were clearly of opinion, that the plaintiffs could claim no title under the act in question, as it was against common right, as well as against *magna charta*, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was, therefore, *ipso facto*, void. That no length

of time could give it validity, being originally founded on erroneous principles. That the parties, however, might, if they chose, rely upon a possessory right, if they could establish it.

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Middleton.

Verdict for defendant.

*Pringle, Moutrie and Harper*, for plaintiffs.

*Pinckney, Parker and Ford*, for defendant.

OLIPHANT against TAGGART.

May Term.

DEBT on a bail-bond. A Monsieur *Bonnefons* had been arrested, and held to bail at the plaintiff's suit, and the bond returned into the sheriff's office, with the name of the defendant subscribed to it, as security for *Bonnefons*' appearance, who afterwards left the country. The bail-bond was not witnessed by the sheriff, or any of his deputies, but by an acquaintance of *Bonnefons*, who had departed for *France* shortly after the commencement of the action.

*Lining*, for plaintiff, offered to produce a witness to prove, not only the defendant's hand-writing, but also the hand-writing of the witness to the bond, and of *Bonnefons* himself. To which

*Pinckney* objected, under the circumstances of the case; and produced to the court, the affidavit of the witness, made previous to his departure for *France*; in which he positively swore, that he had never seen the defendant, *Taggart*, sign the bond in question.

The Court observed, that this was an extraordinary case, much out of the usual course of things. That the evidence offered for the plaintiff, was very regular and proper, in

Proof of the hand-writing of a witness to a bond who is dead or gone beyond sea, is good and regular in order to let in the plaintiff to prove the hand-writing of an obligor. But if an affidavit be produced of the witness himself, who swears that he never saw the obligor execute the bond, it is a good ground for the court to postpone the trial till the witness can be fully examined on interrogatories touching the transaction.

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scribing witness to the bond, in order to let in the plaintiff, to prove the hand-writing of the obligors. But, on the other hand, the affidavit of the witness himself, gave this affair, at least, such a suspicious appearance, that it would be improper to let it go to the jury, until the matter was cleared up.

A commission was, therefore, directed to issue, to examine the witness to the bond, upon interrogatories and cross-interrogatories, to be put by the parties.

May Term.

#### PRINGLE *against* The Executors of WITTEN.

On a covenant that the bargainor is lawfully seised in fee, the bargainee, in case of discovery of defect of title, may maintain his action before eviction. Though for peaceable enjoyment, &c. it is otherwise. Deficiency of quantity, if so great as to defeat the object of the purchase, is good cause for rescinding a contract, for lands. And it may be set off in discount against the bonds given for the consideration money.

THIS was an action for a breach of a covenant in a common release for lands.

It was admitted, that the plaintiff had purchased from the deceased *Witten*, a tract of 300 acres of land, in *St. Mathew's* parish, and given bonds for the sum of 600*l.* being the consideration money agreed upon. And that *Witten* had given the usual conveyances of *lease and release*; and in the release had covenanted, among other things, that *he was seised in fee, of, in, and to, all and singular the lands and premises sold.* And that he had good right, and lawful authority to *convey, &c.* It appeared afterwards, in evidence, that the plaintiff frequently endeavoured to find out the corners and lines of this tract, but could not. That he called upon *Witten* in his life-time, and requested him to point out the corners and lines; but he did not do it. That surveyors were afterwards appointed, who went to the place where the land was supposed to lie, but could find neither corners or lines. *Youngblood*, one of the surveyors, however proved, that he was shewn a tree for a corner, from which a few trees had been marked, but that the marked trees, were about 90 degrees out of the course

laid down in the plot. That, however, admitting that tree to have been the true corner, and the course shewn, the real one ; and that there might have been a mistake in the plot ; yet, according to that course, it would have struck the river so soon, that it would not have left more than about 190 acres in the supposed tract, it being surrounded by elder-surveys. But, in his opinion, the tree shewn, never had been marked for a corner ; and that neither the corner, nor lines of the tract, could be traced.

This testimony of *Youngblood's* was corroborated by that of another surveyor, and of an old inhabitant in that part of the country.

On closing the evidence, *Read*, for the defendants, contended, that the action was not maintainable, because the plaintiff had sustained no damages, nor could damages be sustained, until there had been an *eviction*, by suit at law, from the premises. *Vaugh.* 118, 119. 1 *Wood's Conv.* 405.

*Pinckney* and *Pringle*, in reply, acknowledged that in cases of deeds, which contain only a covenant for *peaceable enjoyment*, or a general warranty of title to the bargainee, the action of covenant would not lie, until after an eviction by suit. But in a covenant, where the bargainor stipulates that he is lawfully *seised* in fee, *of, in, and to all and singular the premises*, it is otherwise ; and covenant *would* lie, before the eviction. That this latter covenant was of a two-fold nature : it went partly to the *title*, and partly to the *quantity*. If there appeared to be a *defect* in the title, or a *deficiency* in the quantity ; in either case, the action would lie, as soon as such defect or deficiency was discovered. In support of a covenant for defect of title, they quoted and relied on 9 *Co.* 61. *Keb.* 58. 1 *Wood's Conv.* 403, 4. where it is laid down, in covenant, that the *bargainor was seised of a good estate in fee, &c.* The breach assigned by the plaintiff was, that he was *not seised of a good estate in fee, &c.* This breach was held to be well assigned, and the plaintiff was not obliged to *shew in whom the estate was*, to which only the bargainor might be privy.

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 ~~~~~  
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 Witten.

A covenant that the defendant is lawfully seised, &c. is intended as to *title*; and a covenant for quiet enjoyment, is intended as to possession. In the first case, the plaintiff may take issue on the defect of the title; but in the second, he must allege and prove a *lawful* eviction, (that is, by suit at law,) and not a *tortious* one, before he can support his action. 3 *Keb.* 755. 1 *Wood*, 404.

With regard to covenant for deficiency of quantity, this depends partly upon the principles of the *civil* law, which agree with the common law. For the covenant for the *quantity* goes to the whole extent mentioned in the deed, both by the common law and civil law. There is no drawing the line; for if there be only one acre deficient, it is a *breach* of covenant. There is, however, this difference in the extent of the remedy or damages, which the party injured is to be allowed. If the extent of the injury arising from the deficiency, is so great as to defeat the object of the purchase, or to lessen it so considerably, as not to answer the designs the purchaser had in view when he made the purchase; in that case, the contract ought to be rescinded *in toto*, and the consideration money, if paid, returned. But if the injury is not so great as to defeat the object of the purchase, then damages ought to be allowed in proportion to the injury. 1 *Dom.* 80 to 82. *Pow. on Con.* 147 to 149.

In the present case, they said, it was extremely doubtful whether the land pretended to be sold, really existed or not, as the surveyors could find neither corners nor lines. But admitting even that a part of it did, it was still uncertain how the lines would run, as it would be necessary to ascertain all the boundaries of the surrounding tracts, before they could be known. At all events, the tract would not be found, according to the evidence, to contain more than 190 acres. This, they said, was such a deficiency in quantity, as would entirely defeat the object the plaintiff had in view when he made the purchase; and would justify the jury in rescinding the contract. This, they urged, the jury might do, by giving damages to the full amount of



the bonds, principal and interest, which the defendants, as executors of *Witten*, held in their hands and refused to deliver up.

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Executors of  
Witten.

*The Court* (present, RUTLEDGE, Ch. J. and BAY, J.) mentioned to the jury, that the law had been very properly stated to them by the counsel for the plaintiff. That it was true that in a covenant for peaceable enjoyment, or on a general warranty, in such a case, the action would not lie at *common law*, without a *previous* eviction by *suit* at law. *Vaugh.* 118, 119. 1 *Wood*, 405. But, in a case like the present, where *title* and *quantity* were both warranted, that doctrine did not apply. In the latter cases, wherever there was a covenant for *good title*, and for the *whole quantity*—in each of these cases the action of covenant would lie, wherever the *defect of title* or *deficiency in quantity* was discovered.

That the jury, if they were satisfied of the fact of so great a deficiency as one-third of the land being wanting, or of the uncertainty of the locations of the land, they might rescind the contract entirely, by giving damages in the manner recommended by the plaintiff's counsel ; or, if they thought a reasonable abatement would do justice to the parties, they might make a deduction from the bonds, according to the injury sustained. That a jury, however, ought not to lend too easy an ear to suits of this kind, which tended to the dissolution of contracts, unless the strong and obvious features of the case would justify it. That the present, however, appeared to be one of that nature ; as it would be extremely unjust, and unreasonable, that the plaintiff should pay so large a sum, unless he had at least so much of the tract remaining, and that with sufficient certainty, as to answer the main object of the purchase.

*The jury* found for the plaintiff, damages to the whole amount of the bonds and interest, with costs, so as to dissolve the contract in *toto*, and to oblige the defendants to deliver up the bonds.



acquired belonged to the master, but, also, every purchase made by her with it, became, *ipso facto*, his, the instant the purchase was made. That as to the defendant's saying he had no property in the girl, such a declaration might have been made under an ignorance of his right ; and it was an established rule of law, that ignorance of a right shall not devest a man of his right. That, at all events, the defendant's wench could not be considered in law, in any other light than as a trustee for her master. He permitted her, in some degree, to be at her own disposal, and work or hire herself out as she pleased ; consequently, all she *gained* was for *his use*. It became a vested right in *him* as soon as she acquired it, and, of course, she had no right to manumit the girl, or do any other act to the prejudice of his interest, without his liberty and consent.

*For the plaintiff*, in reply, it was confessed that the common law would not apply to this case, but the rules of equity and justice, which were a part of the civil as well as of the common law, would. That the laws of *South-Carolina*, and the nature of its climate, justified slavery. Its truest interests made it indispensably necessary to make use of them for agricultural and other laborious purposes. But notwithstanding the law gave the master a claim on the labour and services of his slave, it disclaimed, at the same time, that tremendous power of life and death which the *Romans*, as well as some of the modern nations on the coast of *Barbary*, exercised on their slaves : so far christianity had ameliorated the condition of slaves in this country. Here, the counsel said, was one exception to the general rules of the civil law, in favour of the condition of slavery, and others might be found equally necessary and proper. That the present was a case of a new impression : it was as it were, *sui generis*. There is no case similar to it in the history of our judicial proceedings. It was necessary, therefore, to resort to principles, and square this decision by such rules as would not injure the rights of the master, nor offer violence to the most benevolent affections of the slave. The

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Guardian of  
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the plain principles of justice must sanction the act. The master could certainly have no reason to complain, because he had been fully satisfied. The generosity of the act, and the strong affection the wench must have had for the girl, ought not, they said, to pass unnoticed. A slave herself, and having the means of purchasing her own freedom, she still preferred to remain in slavery, in order to give liberty to her young favourite. This act, the counsel contended, was so singular and extraordinary in itself, so disinterested in its nature, and so replete with kindness and benevolence, that to thwart or defeat the wench's intention, would be doing violence to some of the best qualities of the human heart.

RUTLEDGE, Ch. J. delivered the opinion of the court ; and, in his charge to the jury, observed, that although the case was a new one, yet the court found no difficulty whatever in forming an opinion on it ; for if the master got the labour of his wench, or what he agreed to receive for her monthly wages, (which was the same thing,) he could not be injured ; on the contrary, he was fully satisfied, and all that she earned over ought to be at her own disposal ; and if the wench chose to appropriate the savings of her extra labour to the purchase of this girl, in order afterwards to set her free, would a jury of the country say no ? He trusted not. They were too humane and upright, he hoped, to do

such manifest violence to so singular and extraordinary an act of benevolence.

*The jury, without retiring from their box, returned a verdict for the plaintiff's ward, and she was set at liberty.*

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Guardian of  
Sally  
v.  
Beaty.

DRAYTON *against* THOMPSON.

May Term.

DEBT on bond, assigned to *Gabel and Corre*. A discount pleaded, viz. 4,000lb. ginseng, at 2s. 6d. per lb. On the trial, the jury allowed this discount out of the bond, and gave a verdict for the balance.

*Ford*, for plaintiff, afterwards moved for a new trial, on the ground that he had since discovered evidence, which would on the trial, (if he had known of it,) have disproved all the plaintiff's discount, except about 99% sterling; and that at the trial, he was surprised by a piece of evidence he was not prepared for, to wit, a new agreement concerning the ginseng; by which the defendant had agreed that the plaintiff should ship the ginseng to *Europe*, and sell it for his account, and that the nett proceeds should be credited on the bond. The plaintiff's affidavit was also produced, stating this new agreement, and the account sales of this ginseng. Also, that he had given the defendant notice of it, and that he had the account sales in his possession, and could have produced it on the trial, had he known of it, or had been called upon for that purpose.

It also stated, that the bond in question, had been negotiated by the plaintiff, to Mr. *Bourdeaux*, and by *Bourdeaux* again, over to Messrs. *Gabel and Corre*, who brought forward the suit in the name of *Drayton*, the obligee of the bond. It did not appear that *Gabel and Corre* ever gave *Drayton* any notice of the discount, which was pleaded;

No new trial is to be granted, for discovery of new evidence *after trial*, which might, by due diligence, have been procured *at the trial*; and the more especially too, as the plaintiff may discontinue his suit as soon as he discovers a defect of evidence, which it is probable, might be supplied at a future day.

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Drayton  
v.  
Thompson.

nor did he even know when the trial came on; though *Drayton* himself, stated in a supplementary affidavit, that *Bourdeaux* once informed him, that the defendant, *Thompson*, had called on him, and told him he had a discount against the bond, and that he, *Drayton*, told *Bourdeaux* it was very right, but that such discount would not exceed 100*l.* or thereabouts.

*Harper*, for the defendant, insisted, that the plaintiff ought to have been prepared with his evidence at the trial, without any special notice; that *lis pendens*, was notice to all the world.

The case was argued before *WATIES* and *BAY*, Justices.

*WATIES, J.* The discovery of new evidence has been rarely allowed as a ground for a new trial—and never, where the party might by using due diligence, have procured it before. This appears to be the present case. It is admitted on both sides, that *Drayton* is only the nominal plaintiff, except for the purpose of giving the defendant the benefit of any equity against the bond: and that *Gabel* and *Corre*, who were the assignees and owners of it at the time of the suit, are to be considered as the real plaintiffs.

The single question then is, whether *Gabel* and *Corre* might have procured at the trial the evidence they have since discovered. It is stated, that it was then in the knowledge and possession of *Drayton*, who would have produced it if he had been applied to; but *Gabel* and *Corre*, although apprised of the discount filed, gave no notice of it to him, or made any inquiry whether it was just or not, but suffered the defendant to proceed, *ex parte*, to substantiate it. *Gabel* and *Corre* are therefore guilty of a *laches*; for it appears to me to be incumbent on the assignee of a bond, which is in any manner impeached, to give notice to the obligee, that he may come in and defend it; in the same manner as it is incumbent on the grantee of land, to vouch the grantor to defend the title, where that is brought in question. And if the assignee neglects to do this, the

obligee, like the grantor of land who has not been *vouched*, is not bound by the verdict, but may controvert it in an action to recover, for any deficiency found. If it were otherwise, and if the assignee was not obliged to give notice, it would be imposing an intolerable hardship on the obligee; it would require him to be always on the watch, and if he should have assigned a number of bonds, (which is the case of many,) it would make it necessary for him to be constantly attending at every court in the state, for fear of discounts, which would be an impossible thing. It is therefore the duty of an assignee to give him notice of any discount that may be set up; and if he fails to do this, and the discount is allowed, the assignee takes upon himself the risk of its being legal or not. As the assignees here have neglected to give the obligee notice, and it was owing to this that they had not at the trial, the evidence in his possession, I am of opinion that there is no ground for a new trial.

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Drayton  
v.  
Thompson.

Assignee of a bond is bound to give notice to the obligee of any discount of defence set up against it by the obligor, otherwise he takes upon himself the consequences.

BAY, J. of the same opinion; and the more so because the plaintiffs might have discontinued their suit as soon as they were surprised at this kind of testimony, and relied on the probability of getting better proof at another court.




The Executors of GUERARD *against* RIVERS.

May Term.

**COVENANT** for damages on warranty for land sold. In 1779, the defendant sold to *Guerard*, two tracts of land—one of 1,050 acres and the other of 371 acres, for 100,000*l.* currency, which, when depreciated, was equal to 700*l.* sterling. Soon after the purchase, *Guerard* settled the tracts, cleared part of the rice land, made several improvements and arrangements for an extensive plantation. In 1786, *William Hort* and wife, brought their action of

In covenant for a warranty for land sold, the value of land at the time of the eviction, is the measure of damages.

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 The Ex'rs of  
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 v.  
 Rivers.

ejectment, and recovered from *Guerard* the land in question, being part of an ancient barony which came to Mrs. *Hort* upon the death of an ancestor.

On this action, therefore, being brought by the executors of *Guerard* against the defendant, upon the usual covenants contained in the release, the only question was, as to what should be the measure of damages.

For the defendant, it was contended, that the purchase money and interest should be the measure by which the jury were to be governed, and to that effect, was cited the case of *Stitt v. Eveleigh*, (*ante*.)

For the plaintiff, it was replied, that the real value of the land at the time of the eviction ought to be the measure. The case of *Liber and wife v. The Executors of Parsons*, (*ante*) was relied on in support of this point.

GRIMKE, J. was of opinion with the defendants, that the purchase-money and interest, was the rule for the jury to govern themselves by.

WATIES, J. differed, and thought the value of the lands at the time of eviction, was the best general rule for the government of juries, in cases of this nature. Though in special cases, he agreed, that the jury might make the consideration money and interest, the rule of estimating their damages.

BAY, J. concurred, that the real value of the property at the time of the eviction, and not the consideration money paid, was the true measure of damages. That damages were the compensation given by law, for the *loss* a man sustained by the breach of warranty. Then the loss was the *real value*, or what the property would have *sold* for at the time of eviction. To give less, would not be doing the plaintiff justice. He relied on the case of *Liber and wife v. The executors of Parsons*, which he thought had been determined upon very just and legal principles. As to the case of *Stitt v. Eveleigh*, it was an exception out of the



general rule, as it was founded on a speculative negro contract, made in the course of the depreciation of the paper currency, under very peculiar circumstances; in which the jury had exercised a proper discretion, which was acquiesced in by the parties. But he did not conceive that case as by any means fixing the law, or even calling in question the case quoted by the plaintiff's counsel.

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The Ex'rs of  
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The jury found for the plaintiffs, and declared in delivering their verdict, that they were governed by the real value at the time of the eviction, though they thought the plaintiffs had valued the land too high.

*Pringle and Lining*, for the plaintiffs.

*Pinckney and Rutledge*, for the defendant.

### The STATE against MITCHELL.

September  
Sessions.

IN this case affidavits were submitted to the court, on behalf of one *Heyliger*, against Col. *Mitchell*, one of the justices of the peace for *Charleston* district; and an information was moved for against him, for oppression in office as a magistrate.

*Pinckney*, on behalf of the defendant, opposed the motion, on the ground that the 2d section of the 3d article of the new constitution of the state, had virtually abolished this species of public prosecution; and that the law with regard to it had been entirely changed, and that in future, all prosecutions must be carried on in the name, and by the authority of the state of South-Carolina, must conclude against the peace and dignity of the same. That therefore, every case of a public nature, must come before

All public prosecutions, by the 2d section of the 3d article of the new constitution, are to be carried on by indictment, through the medium of a grand jury; consequently, the proceeding by way of information is abolished in South-Carolina.

## CASES IN THE SUPERIOR COURTS

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The State  
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the court through the medium of a *grand jury*, by *indictment*, and not be left to the discretion of the court.

The counsel for the prosecution, concurred in this construction, and the court were of the same opinion.

On the day following, however, the witnesses, whose affidavits had been submitted to the court, on the motion being made for the information, were sent to the grand jury then sitting; upon which a presentment was made against the said *Mitchell*, "*for oppression in office as a magistrate, and recommending to the legislature that he should be struck off the commission of the peace, as unworthy of public trust.*"

After the presentment had been handed into court, *Pinckney* and *Pringle* moved that it should be quashed, on several grounds, viz.

1. That no specific charge of oppression was set forth in the presentment, upon which the attorney-general could frame a bill, or against which the defendant could defend himself.

2. That the names of the witnesses were not set forth, in order that the defendant might know against whom to bring his action, in case the presentment should prove to be malicious.

3. That it would operate as a *sentence* against a public officer, without giving him an opportunity of *being heard* in his defence; when it was probable, that upon a *trial* he might be honourably acquitted.

4. That as the grand jury had requested their presentment to be published in the gazettes, and this among others, it would be holding out to the world, a man who had been in the confidence of the public, as unworthy of further trust, without being heard; which, in effect, would be fixing a public stigma upon him, without a trial, in every part of the world where the papers should go, before the real merits of the case could be known.

*The Court*, after hearing counsel on both sides, ordered, that that part of the presentments of the grand jury, which affected the defendant, *Mitchell*, and recommended him to be dismissed from his office as a magistrate, be quashed; and their other presentments to be published agreeable to their request; on the grounds that the charge was too general, and not sufficiently specific; that the names of the witnesses were not set forth, and that it operated as a condemnation without trial, which was against *Magna Charta*, and the liberties of a citizen.

A bill of indictment was afterwards found against him by the same grand jury, for falsely and arbitrarily imprisoning *Heyliger* for one night in the guard-house in *Charleston*, under colour of his office. He was accordingly tried at the same term, upon the indictment, and acquitted of the charge.

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The State  
v.  
Mitchell.

Where a presentment of a grand jury against a public officer is general, without specifying the offence and the witnesses' names on whose information it is founded, the court will quash it. 2 *Hawk.* 258. *Barnard.* 140. 4 *Black.* 311.

### The Administrators of MOORE against CHERRY.

September  
Term.

MOTION for a third trial, and to change the venue. This was a case tried in *Ninety-six* district some years ago, in order to determine the right of property to a negro man slave, taken during the war, and sold to the defendant. The property was admitted to have been in *Moore* before the war, and immediately previous to the capture.

It appeared that the negro was taken from some persons called *tories*, by a scouting party under the command of one Col. *Brandon*, who afterwards sold the property taken, and divided the proceeds among the party. At this sale the defendant bought the negro, and under it contended, that the property was secured to him by the act called "*Sumter's law*."

If a jury find a verdict against the obvious, known and well established principles of law, the court will order a third trial, although there had been two former verdicts on the same side.

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 Adm'rs of  
 Moore  
 v.  
 Cherry.

For the plaintiff, it was urged, that this was unauthorized plunder, and sold by a party of men who could not legally make sale of it ; and that the law called *Sumter's* law, did not protect it, being in a different district, and this party not acting by Gen. *Sumter's* command, and not being distributed by a board of officers to the soldiers or state troops under the command of Gen. *Sumter*, in lieu of pay ; which, and *which only*, was the *kind of property* this law intended to protect against the original owners.

GRIMKE, J. who sat at the first trial, gave a charge decidedly against the defendant.

*The Jury*, however, returned a verdict in favour of the defendant ; in consequence of which, a new trial was moved for in *Charleston*, and granted.

At the second trial, BURKE, J. sat, and charged in favour of the plaintiffs, and the jury, notwithstanding the judge's direction, again found for the defendant.

The present was, therefore, a motion for a third trial, and for leave to change the *venue*, on two grounds ; 1. That the jury had found a verdict twice against the obvious principles of law, and both times against the opinion of the presiding judge, as well as against the opinion of the judges at bar. 2. That a fair and impartial trial could not be had, on account of the prejudices the people in *Ninety-six* district entertained against the class of people, who went during the war, by the name of *tories*.

RUTLEDGE, Ch. J. was of opinion, that as this was a dispute about property taken during the war, it was best that there should be an end of it, and that a third trial ought not, for that reason to be granted. He admitted, however, the power of the court to order a third trial, and declared that he would concur in doing so in this case, if it were not for the circumstance before mentioned.

WATIES, J. When a new trial was before ordered in this case, it was evident from the report of it, that the verdict was contrary to law. It is evident that the second verdict is equally so ; for it is expressly stated that there was no legal appropriation of the negro ; and it has been frequently determined, that property taken during the war, and so circumstanced, was not divested out of the former owner. The question then is, whether the court will direct a third trial ? And I have no doubt that it ought to do so. It is insisted, that two concurrent verdicts are conclusive ; but in the cases quoted to shew this, it appears that the actions were for *damages*, and of course, depended greatly on the consideration of facts. If this were such a case, I should think that we could not interfere any farther, because the subject would belong chiefly to the jury, and the opinion of two juries ought to determine it finally. Or if the law was complicated with facts, so that the application of it was doubtful, and it could not be independently considered, the construction of it by two juries in the particular case, might be allowed to be definitive. But here is a clear and established principle, uncontrolled by any facts, which two juries have said shall not have its fixed operation. Shall their opinions be allowed to change the law ? If they were, there would very soon be no certainty in any law, or in any of our rights as freemen. For however honest they may be, yet having no legal knowledge, and being liable to be misled by the counsel, different juries would make different constructions, and the law would be the fluctuating opinion of every twelve men who happened to sit as jurors at any court. Legislators as well as judges would both then be useless ; and the persons and the properties of the citizens, instead of being governed by constant and uniform rules, would be governed by such rules as private opinion would occasionally dictate. In what respect would such a government differ from a despotic one ? In no other than the name. God forbid then that the verdicts of two juries should make the law ! As this would be the effect in the present case, I feel it my duty to pre-

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vent it, as far as it depends on me, by saying there should be another trial.

BAY, J. Wherever the jury find a verdict against the plain and obvious principles of law, and against the directions of the judges who tried the cause twice, as well as against the opinions of the judges at bar, there ought to be a third trial; otherwise there can be no certainty in the principles of the law. In cases sounding in damages, which properly come within the province of a jury, the court will seldom or never grant a third trial; or in matters where law and facts are, in a great measure, blended together. But wherever the principles of law are outraged by these verdicts, we ought uniformly to grant a third trial, so as to give the party a chance for justice. The case of *Goodwin v. Gibbon*, 4 Burr. 2188. is in point on this head—where Lord Mansfield said, “there was no ground to say that a new trial should not be granted after a former new trial; *there is no such rule*; a new trial must depend upon *answering the ends of justice.*” Mr. Justice Yates was clear that a second new trial ought to be granted, as well as the first, if the reasons were sufficient for granting it. Mr. Justice Aston concurred. Mr. Justice Hewitt—the granting a new trial a second time, must depend upon the circumstances of the case. 2 Morg. Essays, 72, 73. As to the second part of the motion to change the venue, we cannot grant it, because the party may have a special jury, which he has not yet tried.

## BUFORD against FANNEN.

September  
Term.

AN action of *trover* had been commenced and tried, at Orangeburgh, for negroes and a horse, taken by the defendant from the plaintiff's plantation, during the war. The negroes, it appeared, soon afterwards returned, or were delivered back, but the horse was never sent back. The plaintiff, after proving the value of the horse, wanted to give evidence of consequential damages sustained by the loss of his crop; but GRIMKE, J. who tried the cause, refused to let the plaintiff into such kind of testimony, in the present form of action, and the jury found a verdict of 40% being the value of the horse.

In an action of *trover*, the value of the property, and compensation from the time of demand, must be the measure of damages for the jury.

The present, therefore, was a motion for a new trial, on the ground of misdirection in the judge, and for refusing to let the plaintiff into evidence of consequential damages. After hearing *Harper* for the motion, and *Ford* against it,

RUTLEDGE, Ch. J. was of opinion that this kind of testimony might be allowed in some cases, and was for granting a new trial.

WATIES, J. It is of great importance to keep different issues distinct, that the parties in one form of action may not be surprised by evidence which belongs to another. The evidence which the plaintiff wished to produce, would have been admissible in *trespass*, but was, I think, properly rejected in this action. Where there has been an *unlawful taking*, either *trespass* or *trover* will lie; but if the party proceeds in *trover* he waives the *tort*, except as it is evidence of a *conversion*, and can only have damages for the value of the property converted, and the use of it while in the defendant's possession. The real value of the property is not always the sole measure of damages; if the conversion of it is (or may reasonably be supposed to be) productive of any

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Buford  
v.  
Eannen.

benefit to the defendant, the jury may give additional damages for it ; as where *trover* is brought for money in a bag, *interest* ought to be allowed, by way of damages, for the detention ; so, in this case, if the negroes had not been delivered, damages could be given for the labour of the negroes ; for the use of money or negroes is a certain benefit to the party who converts them, and he ought to pay for it. But where he acquires no gain to himself by the conversion, it does not appear to me that he is answerable for any damages above the real value of the thing converted ; if he was, he would be answering for a mere *delictum*, for which he is not liable in *trover*. By waiving the *trespass* in this action, which the plaintiff must do, he waives, I conceive, every kind of personal wrong which is unattended with any gain to the trespasser ; he releases him from every thing which death would release him from. If, for instance, the defendant had been dead at the time of bringing this suit, what could the plaintiff, in any form of action, have recovered from his executors ? The same amount which he has now recovered, and no more ; that is, the value of the horse taken, or damages for the use of the negroes, while they were in the defendant's possession ; but nothing for the loss of crop, which proceeded *ex delicto*, and produced no benefit to the defendant. For the same reason as this action is founded in property only, and no damages can be allowed for the mere *delictum*, I think the evidence offered was not admissible, and that the judge was right in refusing it.

BAY, J. thought, that as in an action of *trover* the *tort* was waived, all its consequences were relinquished with it. The very nature of the action *supposed* that the defendant *came lawfully into possession* ; and, if so, no damages could or ought to be given till the true owner made his demand ; from which time only, damages ought to be calculated. And where no specific demand was proved, then from the time of the commencement of the action ; and relied on the



case of *Cooper et al. v. Chitty et al.* 1 Burr. 31. where the nature of this action is particularly defined ; also, 3 Burr. 1364, 65. 2 Esp. 353.

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Rule for a new trial discharged.

The Executors of HARRISON against The Administrators  
of GILES.

September  
Term.

UPON *plene administravit* pleaded in this case, the question was, whether a note of hand given in June, 1786, was become a specialty by virtue of the 45th section of the county court act, and was to be put on a footing with bonds, and paid in average with them, under the *executor's* and *administrator's* law, in case of deficiency of assets ?

Notes of hand are not, by the 45th section of the county court act, put upon a footing with bonds, and to be paid in average with them, but must, under the executor's law, (in case of a deficiency of assets,) be paid according to the course of the common law.

*Parker*, for the plaintiff, urged, that this clause of the county court law had altered the common law, and made that which was only a simple contract, a *specialty*. That the house of assembly had a creative power, and, in this instance, had exercised it, by giving existence to a new kind of specialty unknown to the common law ; and, of course, had given the same kind of efficacy to a writing, without sealing and delivery, which belonged to one with all these legal solemnities ; and had, by this means, put *notes* and *bonds* upon the same footing. That the county court law having thus put them upon an equality, the executors' law, passed in 1789, found them so. That the 26th clause of this act, classed *bonds* and *other obligations* together, as of equal degree, and expressly directed that in case of a deficiency of assets, no preference should be given to debts of equal degree. Besides, the word *obligation* in the *executor's* law, was of the same import as the term *specialty*, mentioned in the county court law ; and that notes, being thus made specialties, should, according to the legal construction of the

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executor's law, be considered as obligations, and, of course, paid in average and proportion with bonds.

Ford, for the defendant, contended, that to give such a construction to the clause in question, was an absurdity and a solecism in terms; for specialties in law were instruments under hand and seal, executed and delivered with legal solemnities, in direct contradistinction to loose notes and memorandums in writing, which were inferior in degree and efficacy to them. This clause in the county court act, was never intended, he said, to alter the common law, with regard to the *legal* import and *efficacy* of these solemn deeds, but only to regulate the practice of the county courts, and to blend a number of actions together into one, in order to prevent confusion which might arise in those courts, by inexperienced practitioners, unacquainted with the nice distinctions of actions; for it expressly declares "that all judgments, bonds, bills, promissory notes, &c. shall constitute specialties, and that all suits brought on them in those courts, shall be by action of *debt only*," which shews that they only meant to consolidate the action of *assumpsit*, *covenant*, and *debt*, into one common mass. This must have been the obvious meaning of the clause, if it meant any thing. Besides, the common law was never altered by construction, but always by some *express* and positive act. It was a maxim of the common law that a statute made in the *affirmation*, without a negative express or implied, cannot alter the common law. 2 *Inst.* 200. 4 *Bac.* 641. That the common law had wisely given a preference to solemn deeds under hand and seal, on account of the care and circumspection used in the making and delivery, and that nothing in this clause positively or expressly destroyed this preference given by the common law. It still remained, although notes were constituted a kind of specialty for bringing the action of debt in the county court, and *there* only. He further contended, that wherever a new remedy was given by a statute in a particular case, (as the present,) this should not be construed to alter the common law in any other than the particular case, 11 *Rep.* 59. *Hob.*

298. 4 *Bac.* 647. That by this clause a new remedy was given, to wit, the action of *debt*, for the old action of *assumpsit* in the county courts. But the giving this new remedy, did not alter the priority or precedence which bonds had in point of payment to notes, &c. In this respect, notes stood precisely on the same footing they did before the passing of the law; that at all events, this clause in the act was a very doubtful one, and it was difficult to collect from it, whether it was intended to alter the common law as to the efficacy of bonds and notes, or only to regulate the practice in the county courts; and that this being the case, it was a rule of law that all obscure statutes ought to be construed according to the rules of the common law. *Win.* 86. 4 *Bac.* 647. Giving it therefore this construction, bonds must have a preference in point of payment. If, however, a doubt could arise on the construction of the clause in the county court law, the *executors'* law put it beyond doubt; for it expressly directs the order in which debts should be paid, viz. judgments, mortgages, executions, rent, then *bonds and other obligations*, and lastly, open accounts, &c. not a word about this *new created* specialty mentioned in the county court law: on the contrary, it recognises the course of the common law, with regard to payment in case of a deficiency of assets. *Bonds* and other *obligations* are classed together as of equal degree. The term *obligation* is well known at common law to be an instrument under seal, in contradistinction to bills, notes, &c. which are only *promises* in law, and inferior in their nature to deeds under seal. Then it is a maxim in law, that where a statute makes use of a term known at common law, it shall be taken in the same sense as it is taken at the common law. 6 *Mod.* 143. 4 *Bac.* 647. The word *obligation* therefore, cannot legally be construed to mean a note of hand or bill, *not* under seal, when it is known in law to be a deed *under* seal.

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*The Court* (present, RUTLEDGE, Ch. J. WATIES, J. and BAY, J.) were clearly of opinion with the defendants on every ground. That the note in question ought to be subject to

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the rules of the common law, and could not legally be paid in average and proportion with *bonds* or *deeds* under seal. That a contrary adjudication would be altering the common law by construction, when there were no express words in the clause making such alteration. That the clause in the county court act, seemed calculated rather to regulate the practice in those courts, than to change the legal efficacy of deeds under seal, or placing notes or memorandums in writing, without seal, upon a footing with them. That at all events, as the clause alluded to was involved in obscurity, and contained in itself a glaring contradiction in legal terms, they thought it was the duty of the court to resort back to the common law, and make that the rule of their decision in the present case; and the more especially, as the executor's law recognised the principles of the common law in the payment of debts, and in no part justified the construction contended for by the plaintiffs.

September  
Term.

GRAY against The Executors of HANDKINSON.

Where a *mill-seat* was the object of the purchase of a tract of land, which is taken away by an elder grant, it is a good cause to rescind the contract, and may be pleaded in discount against the bond given for the consideration money.

THIS was an action of *debt* on a bond given for a tract of land. The defence set up was, that the object which *Handkinson* had in view in the purchasing of the tract of land, was a *mill-seat* which was represented to be on it. The tract was only valuable on that account, being chiefly pine land.

Shortly after the purchase by *Handkinson*, it was discovered that an elder survey included this seat and a considerable quantity of fine timber land adjoining, by which means the great object the purchaser had in view was defeated, and the rest of the tract rendered of little value. Several surveyors were called, and plots produced to prove the facts above stated.

*The Court* (present, RUTLEDGE, Ch. J. BURKE, J. and BAY, J.) mentioned to the jury, that this was a kind of equitable defence which formerly belonged to the jurisdiction of a court of chancery, but that courts of law had lately let the parties into it in a court of common law, as well as in a court of equity, *on the ground of fraud*. That this fraud might arise either from the intent and design of one party to impose upon another, or it might arise from circumstances which neither party knew of, or could foresee at the time of the contract. But that from whatever cause it arose, it was a proper subject for investigation in this court, wherever it could be discovered, or traced out, and came as well within the province of a jury, as before any other tribunal. That every case however, of this nature, required the exercise of good sense and sound discretion in a jury, in order to distinguish between these kind of contracts, which ought to be rescinded entirely; and those, where the party was entitled to an abatement of the price only, in proportion to the injury. That the rules of the *civil* law, which had been incorporated with the common law on this head, were of excellent use in determining every question of this nature. The first was, that wherever the defects of a thing sold were *so great*, as to render it *unfit* for the use the purchaser intended, and the seller represented, in such case, the contract ought to be rescinded. Secondly, where the defects were not so great as to warrant a rescision of the sale *in toto*, then such abatement of the price ought to be made as might be just and reasonable, according to the nature and extent of the defects. By these rules, the jury would judge of the present case. If the mill-seat was the *great* object which the defendants' testator had in view at the time of the purchase, and the remainder of the land would be of little value without it; then it would be the duty of a jury to find for the defendants. But if, again, this mill-seat had been only a *secondary* object of the purchaser, and the remainder of the land would not be materially injured by it, they ought to make such a reasonable abatement as would make the party whole for any injury he

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might sustain on account of the deficiency or defect, which could be deducted from the amount of the bond.

The jury retired a few minutes, and returned with a verdict for the defendants.

N. B. Upon the principles of the foregoing case, a great number of causes have been determined, both for defects in the *quantity* and *quality* of lands ; and for *unsoundness* and *defects* in negroes, and other personal property. The case of *Samuel & William Scott v. Denoon & Co.* for selling a negro with a *good character*, when he had been previously convicted of a felony ; the case of *Bonneau v. Kelly*, for selling a negro as a *good carpenter*, who knew little or nothing of the trade, &c. *cum multis aliis*, were all determined upon the above principles.

September  
Term.

SMITH and LORING *against* FOLTZ, Survivor of FOLTZ and LORENS.

Where the acceptor of a bill has a balance due him on mutual transactions between him and the drawer, the drawer shall not make use of a payee's name to recover a bill which has been protested for non-payment, when there is money really due from him to the acceptor.

CASE on a bill of exchange against the acceptor, for 118*l.* Boston currency. The bill was drawn by *Parington & Hussey*, merchants in *Boston*, in favour of the plaintiffs, on *Foltz & Lorens*, in *Charleston*. When it was presented for acceptance, neither *Foltz* nor *Lorens* were at home ; it was therefore accepted by *Keller*, their clerk, for them. On the bill becoming due, *Foltz & Lorens* refused paying it, saying they had no effects of the drawers in their hands, and because it had been accepted inadvertently by their clerk, who was ignorant of that circumstance at the time he made the acceptance. The bill was accordingly sent back to *Smith & Loring*, who returned it to the drawers, *Parington & Hussey*, from whom they received payment.

*Ford*, for the defendant, stated that he had witnesses to prove the return of the bill to the drawers, and that the payee had received payment, consequently they had no right of action. That it would be unjust to allow the drawers to make use of the names of the plaintiffs to recover money from the defendant, when the plaintiffs had been paid, and when there was a balance really due from the drawers to the defendants, on a general account.

*Fraser* objected to this evidence, as it would affect the credit of bills of exchange in the hands of fair holders. But

*The Court* ruled, that it was perfectly regular to go into the evidence, otherwise it might be so contrived, that a payee or indorsee might be paid twice. It would be manifestly unjust to permit drawers thus to make use of the name of a third person, or persons, to recover money out of the hands of the acceptor, at a time when they, the drawers, were in the debt of the acceptor; because, if a suit had been brought by the drawers themselves, a discount might have been set up. Here no person is injured by permitting the testimony.

Two witnesses were then sworn, who proved the facts as stated, upon which the defendant called for a nonsuit, as the plaintiffs could have no cause of action, which was ordered accordingly.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURTS OF COMMON PLEAS**  
**AND**  
**GENERAL SESSIONS OF THE PEACE, &c.**  
**IN THE YEAR 1793.**

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The STATE *against* GUTRIDGE.

*January  
Sessions.*

THE prisoner was indicted for counterfeiting a *ten* pound bill of the *paper medium*, and the jury found him *guilty* upon the second count of the indictment, which charged him with “counterfeiting a bill of the denomination of ten pounds, &c. which was signed with *two* of the names of “the commissioners.” It was moved in arrest of judgment, that as the act of the legislature prescribed a particular form for the bills of the paper medium, in which the signatures of *three* commissioners were required, and this counterfeit had only *two*, the crime was therefore not complete. This point was argued before all the judges, who afterwards delivered their opinions separately.

To counterfeit a ten pound bill of the *paper medium* of this state, with only two of the commissioners' names to it, is not felony under the act of assembly authorising the emission of such bills.

RUTLEDGE, Ch. J. and Judges GRIMKE and BAY, thought the conviction was insufficient, because the bill, if real, would not have been valid, for want of the third commissioner's name, and could not, therefore, be the subject of an offence within the act. The case of the *King v.*

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pose, and push it into circulation, I am of opinion that the prisoner thereby committed the offence which the act intended to prevent. And whether such bill, if genuine, were void or not, is immaterial. The plain reason of the case, and the nature and consequences flowing from the offence make this evident; and the reasoning is well supported upon the weight and authority of *Hawkswood's* case, *Lee's* case, and *Sterling's* case, reported by *Leach*. *Hawkswood* was convicted of forging a bill of exchange; the bill was written on paper *not stamped*, which would have made it void had it been a genuine bill; yet the court were decided and unanimous that the conviction was right. *Lee's* case was similar to this, and decided upon the same principles. A similar decision was made in *Sterling's* case; he was convicted of forging the will of a person who was then living. The writing, had it been genuine, would have been void; for there could be no such instrument, in contemplation of law, as a last will and testament, until after the death of the testator; but notwithstanding the invalidity of such a will, a conviction for the forgery of it was deemed good. It is true that the authority of *Moffat's* case appears to run against these decisions: he had forged a bill of exchange which, as the law stood, would not have been valid or negotiable, had the bill of exchange been real; the forgery of it was deemed not to be a capital offence. But to this there is opposed the weight of the three cases before mentioned; and what is of greater weight to my mind, the *plain reason of the thing*. In the present instance the prisoner's offence consists, not in passing a counterfeit bill, to the likeness of one that might be good or bad, but, in passing a bill with such a reasonable likeness on the face of it, with such strong features, resembling a real bill, as fitted it, and did answer the purpose of passing it for good money, and thus push it into circulation. Whether he who counterfeited the bill was ingenious and accurate or not, cannot, in my opinion, make in favour of him who passed the bill in this case. The fact is, that the bill passed by the prisoner, had but too much the similitude of a real one, and he was but too suc-

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the naked eye ; and this obliteration was not badly imitated by omitting the signature altogether. It condensed and strengthened the deception, and thus helped the counterfeit into circulation with success, and therefore removes all legal claim to such an interpretation as can subvert the prisoner's conviction. In giving this decision there is one circumstance that gives me pleasure, which is, that the opinion I give is not likely to affect the life of the prisoner. However, whether it did or not would not influence *my* judgment. The duty of my station obliges me to steer a course with the rights of the citizen on the one hand, and the authority of the laws on the other.

WATIES, J. The crime which the law describes, and which it intends to punish, is a *counterfeiting* of the paper medium. The question, then, is, whether the verdict of the jury is a good conviction of this crime ? It appears to me to be so, both from a reasonable and a literal construction of the act. In establishing the paper medium as a substitute for money, it was necessary to protect its credit and circulation. It was necessary, therefore, to provide for the safety of the bills, from the time of their issuing until they ceased to pass current ; to guard them from counterfeits, not only in the original perfect form, but in the future altered and defaced state which use or accident might occasion ; otherwise, the security proposed would be only temporary, and, after a short time, these bills would be exposed to all the mischief which the law intended to prevent. From the daily and hourly use of them, they would soon change their

appearance ; some would be torn, others in part obliterated, and most of them materially differ from the fair state in which they first issued. All this has actually happened ; and every one knows that many of these bills have now only *two* of the commissioners' names visible on them. But they, notwithstanding, pass current, are received in payment of taxes, and in all other payments, without the least scruple or distrust ; for, although the signature of one of the commissioners, from some imperfection in the ink, is now wanting, yet it is known that they all *once* possessed it, and the want of it is no objection to their currency. If, then, they are current, they must be *valid* ; and, if they are valid, a counterfeit of them in this state must be an offence within the act. I can therefore see no similitude between this case and the case of *Moffat*. In that, there was a forgery of a bill of exchange, which, if real, would have been *void* ; in this, there is a counterfeiting of a bill of the paper medium, which, if a true one, would be *valid*. The reason in one case is essentially different from the reason in the other. A bill of exchange has only a temporary existence ; a new bill is made for every new occasion ; soon ceasing to circulate, because its purposes are soon answered ; it is not liable to suffer any change in its appearance, from frequent circulation, and if there should be any material defect in it, there would be no room to presume that it was occasioned by use, but the presumption would be, that it was an original defect ; it would not, for this reason, be received in payment, and any counterfeit of it, in this state, would not, therefore, be a crime, because it would not be apt to impose. But the paper medium has a permanent existence, it serves the purposes of gold and silver, and it changes its appearance by use ; it is, nevertheless, still current, and will continue to be so until it is decried by law or by popular opinion. From a further view of it, its legal analogy to coin will appear more fully ; and if we compare the cases relative to the counterfeiting of coin with this case, it will be difficult to discriminate between them. It is objected that

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the paper medium is the creature of a positive act ; that the signature of three commissioners is *essential* to it ; that therefore this form must be observed in a counterfeit. But coin is also the creature of law ; for it is made legal here by a positive act, which legitimates various foreign coins, and in all of them a particular form or impression is also essential. In *England* the legitimation of coin is always by indenture, between the king and the master of the mint, which prescribes the weight, denomination, impression, &c. and without this the counterfeiting of it would be no crime. *Hale, P. C.* 196. A particular *impression* is *essential* to it. *Id.* And yet, in the case of the *King v. Wilson, Leach*, 322. a counterfeit shilling, *without the vestige of impression*, was held a complete act of treason, within the statute of 25 *Ed. III.* for it had a reasonable likeness to the *current coin*. Why not allow the same construction to our act, which has also for its object the protection of a *current money* ? The mischief of the crime does not consist in making a critical copy of every part of a bill of the paper medium, for all this may be done without doing any injury, if the resemblance to the true bill is not sufficient to deceive, but the mischief consists, as in the case of coin, in making such a likeness to it as will be apt to impose and pass current. This is the kind of counterfeit which tends to cheat the public, and weaken commercial faith ; and this must have been the kind which the law contemplated, or the penal clause would now be impotent ; for the only counterfeits that will be probably attempted in future, will be such as bear a similitude to the worn and altered state of these bills, (which is the present state of most of them,) because the semblance of long use will be apt to gain greater confidence, and, of course, be less liable to detection. As such counterfeits are the most dangerous, it may be fairly presumed that the legislature had them chiefly in view, and that as the true bills would, in the course of constant circulation, unavoidably suffer some change, the law was intended to protect them in every state of their *current* existence. They are, without doubt, the *legal bills* of the paper medium, however changed and de-

faced they may be, as long as they are *current*; like *English* shillings, which are the *legal coin* while they pass, although they have lost their impression. It appears to me, then, to follow necessarily, that a counterfeit of a bill in this state which, if real, would be a current one, is a complete offence within the law, and therefore I think the conviction right.

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## FOTHERINGHAM against The Executors of PRICE.

January  
Term.

THIS was an action of *assumpsit* upon a bill of exchange, by the indorsee against the executors of the indorser.

The declaration contained two counts; 1st. A common count by an indorsee against the executors of the indorser, under the law of merchants. 2d. A special count, by which he made himself liable by his *promise* to pay it.

The circumstances were these: on the 1st of *July*, 1784, *James Neilson* drew the bill in question for five hundred guineas, at sixty days, on *Samuel & Moses Myers*, in *Amsterdam*, in favour of *William Price*, the defendants' testator. This bill afterwards came into the hands of the plaintiff, by indorsement; on the the 30th of *August*, 1784, it was presented and noted for *non-acceptance*, but was not protested for *non-payment* till the 4th of *November*, 1785, and returned in *February*, 1786. In support of the first count, the bill and protest were produced in the usual form. And in support of the second count, a witness proved, that upon receiving advice that the bill was refused in *November*, 1784, he called and gave *Price* a verbal notice of it, and that a few days after, *Price* called on him and said that *Neilson* had directed an attorney to secure the payment out of some bonds he had placed in his hands for recovery. That on the 2d of *June*, 1785, he wrote *Price* a letter on the subject, and that he then *promised payment*. That

Where a promise is made by an indorser of a bill of exchange, to take it up, when it is returned, under an ignorance of the circumstance of *due diligence* not having been used by the holder, such promise shall not bind him. Where a drawer at the time of drawing, has no effects in the drawee's hands, no notice or protest is necessary in an action against the drawer; for that is a fraud in itself, but it is otherwise in an action against the indorser.

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nothing further passed between them respecting it till the bill and protest made their appearance in *February, 1786*. It came out also from other testimony in the course of the cause, that other bills which *Neilson* had drawn in the summer of 1784, had been returned in the spring of 1786, duly protested, and that he had duly taken them up, particularly one for 600*l.* to Mr. *Blacklock*, and another for 1,000*l.* in favour of Mr. *Legare*.

For the defendants, it was contended, that the deceased, *Price*, was never chargeable by the law and custom of merchants, on account of the *laches* the holder had been guilty of in not returning the bill in due time, when *Neilson* was solvent, and when he, *Price*, could have compelled him to give him security for, or paid the amount ; both of which he was prevented from doing, by not receiving the bill and protest, either for non-acceptance or non-payment in due time. That as to the promise to pay, it was made under an impression and idea that every step which the law of merchants made necessary, had been taken by the plaintiff, or his agents ; the *laches* of the holder being then utterly unknown to him ; and that had he been apprised of that circumstance, he never would have made such a promise ; and, therefore, under these circumstances, it was contended his promise was not binding.

For the plaintiff, it was answered, that where a drawer has no funds in the hands of a drawee, there no protest is necessary in an action against the drawer ; because he cannot possibly suffer any damage for want of protest. *5 Burr. 2670, 2671. Durn. & East, 408.* And that the same reason should hold good with regard to an indorser. That at all events, a person may waive a right or benefit which the law gives, and that ought to charge him.

For the defendants, in reply, it was admitted that where a drawer has no funds in the hands of the person on whom he draws, no notice or protest, in an action against him, is necessary, for the reason mentioned ; but it is very different in an action against an innocent indorser, who knows



nothing of such circumstance. As to him, therefore, it is indispensably necessary, that he may be enabled to secure himself from the drawer. That if the protest had come in due time, *Price* could have compelled *Neilson* to have paid or otherwise secured him. But as it did not, it was optional in *Neilson* to do it or not, as he thought proper; and although he promised to give his attorney orders to pay it out of bonds and notes in his hands, he never did it. In the other cases, where the protests were sent out in time, the indorsers were secured and paid; but, owing to the plaintiff's neglect, the indorser in this case, was not; for *Neilson* became insolvent soon after the bill arrived in 1786. That as to the promise made by *Price* to pay this note, it was void: for it is clear law, that if a person *not bound by law* make a promise, under a concealment of facts, or an ignorance of them, he shall not be bound by it. 1 *Durn. & East*, 712. 169, 170. In the present case, the bill was not protested for fourteen months after it became due, of all which, *Price*, the indorser, was totally ignorant. He promised under an idea that all was regular, and that he was by law *chargeable*; and as he was not, such a promise is void.

All the judges were present at this trial, and were unanimously with the defendants on both grounds, to wit, that where a drawer has no effects in a drawee's hands, no protest as between them, is necessary; but where an indorser is to be chargeable, it is necessary. In the first case, it is a fraud in the drawer to draw without funds; he cannot possibly, therefore, be injured: besides, it is a maxim that no man shall take advantage of his own wrong. But with respect to an innocent indorser, he has no other way to compel a drawer to do him justice, but by having the protest in his possession, to enable him to call regularly on him. It is clear, therefore, that *Price* was not, on account of this *laches*, chargeable by the law of merchants. As to the promise, it was evidently made under an idea that he *was by law liable*, when in fact he really *was not*;

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and that so being made, under an ignorance of the circumstances of this case, it was in itself void.

Verdict for defendants.

*Pinckney and Parker*, for plaintiff.

*Rutledge*, for defendants.

January  
 Term.

JAMES and SHOEMAKER against M'CAEDIE and COMPANY.

Where goods are consigned to factors, without any particular directions concerning them, and they, in order to enhance their value, sell them at the usual credit, to a merchant, solvent at the time of sale, but who afterwards becomes insolvent; the factors shall not be chargeable with the loss.

THIS was an action tried before a *special* jury, for a quantity of iron shipped and consigned by the plaintiffs, who were factors in *Philadelphia*, to the defendants in *Charleston*.

The defendant pleaded a discount of four casks of indigo, which they, in their turn, had shipped and consigned to the plaintiffs in *Philadelphia*, which nearly balanced the demand for the iron.

The plaintiffs in reply, admitted that these four casks of indigo came to their hands; but as there was not a ready sale for that article in *Philadelphia* at the time of its arrival, they had, in order to enhance the price, sold it at three months' credit, to one Mr. *Borger*, a merchant, then in good credit; but before it became payable, he became insolvent, and they never received any thing for it. It also appeared from the evidence of a witness, who had been a clerk in the plaintiffs' house at the time of the transaction, that it was then usual and customary among the merchants and factors in *Philadelphia*, to sell indigo on that credit; and that no orders to the contrary accompanied the indigo when consigned.

For the defendants it was then urged, that they had given no directions to sell on a credit ; and that as the plaintiffs had taken upon them *to give a credit* without their *orders* or *permission* for that purpose, that they were therefore responsible.

1793.  
James and  
Shoemaker  
v.  
McCredie and  
Company.

After hearing the plaintiffs' counsel in reply,

*The Court.* In general, every factor is bound to sell goods consigned to him for ready money only, unless he has some discretionary powers given him, or has orders to the contrary ; or unless the *usage* and *course* of trade at the place where the sales are made, will warrant it ; in which case, such *usage and custom* will justify the factor in making the sales conformably. In the present case it has been proved to have been the course of trade in *Philadelphia*, to sell indigo at three months' credit, when this sale was made ; and the plaintiffs did neither more nor less than every other merchant or factor did, and therefore they come within the rule of law above laid down.

*The Jury*, without quitting their box, returned a verdict for the plaintiffs to the full amount of their demand.

SNIPES against The SHERIFF of CHARLESTON DISTRICT.

January  
Term.

THIS was a rule served on the sheriff, to shew cause why certain monies, levied on the plaintiff's execution, against one *M'Farlane*, should not be paid over to him in discharge of the debt,

The objection to paying over the money was, that there was an execution in the sheriff's office, prior to that of the plaintiff's, lodged by *Daniel O'Hara*, who insisted that the

Where no proceedings are had on a *fiery facias* for a year and a day, it does not lose its *lien* or *binding* efficacy, but only its *active* energy. The *lien* sheriff.

commences on the delivery of it to the

1793.

Snipes

v.  
The Sheriff  
of Charleston  
District.

money should be paid over to him, as he had the first lien on the goods levied.

To this again it was replied, that *O'Hara's* execution had never been renewed within the year and a day previous to the lodging of the *fiery facias* in this suit; and that he had consequently lost his lien on *M'Farlane's* goods, which left an opening for the present plaintiff to come in for his demand; so that the question was, to which of the plaintiffs, the money ought to be paid—whether to the party plaintiff, in the first or second execution?

There were no less than three learned arguments on this question. In the first place, it was admitted by all parties that by the common law, the *fiery facias* bound the defendant's goods from the test of the writ, so that any sale made afterwards was void; because the goods were from that time, attendant on the execution, to answer the plaintiff's demand. That many inconveniences, however, had been experienced from this retrospective operation of the execution, in binding the goods from the test of the writ, so as to make sales uncertain, especially as the parties frequently kept these executions by them privately, so that no purchaser could know whether the defendant's goods were bound or not, which was introductory of the wise regulation in the statute of frauds, which declares that *the defendant's goods shall be bound only by delivery of the writ to the sheriff*, who was to mark on the back of it the day and year of its delivery; which was in fact, no more than restoring the old common law, which supposed the writ to be delivered to the sheriff immediately from the test. So that with regard to the time of the commencement of the lien of the execution on the defendant's goods, both by the common law and the statute of frauds, all the parties agreed.

But the great difference in opinion was, with regard to the loss of this lien. On the part of the present plaintiff, *Snipes*, it was generally contended, that on the expiration of the year and day, after lodging the execution in the sheriff's office, the lien on a defendant's goods ceased. That if the lien was continued a day longer, it might for a year, or any

given length of time, and so there would be no end to it, which would, it was contended, be absurd. That as the execution had, on the expiration of the year and day agreeable to this doctrine, lost its lien, if any other execution stepped in before a renewal of the former one by *scire facias*, it had by construction of law, a preference; and that as there has been no renewal of *O'Hara's* execution, in that case, *Snipes* was well entitled to have the money in the sheriff's hands.

On the other hand, again, it was insisted by the counsel against the motion, that the execution did not lose its *lien* or *binding efficacy*, on the expiration of the year and day, only its active energy. That by the statute of frauds, the commencement of the lien was created by the delivery of the execution to the sheriff, which was a right given to the plaintiff; and that by virtue of this right, the defendant's goods were attendant upon the execution, for satisfaction of the plaintiff's demand. That neither the common law, nor the statute of frauds, fixed any period to the duration of this lien and that therefore of necessity, it must remain till final satisfaction was made. It was admitted by them, that a plaintiff could not proceed upon his execution after a year and a day, without renewing it by *scire facias*. But if a younger execution forced a sale of the defendant's goods, they must be sold subject to the prior lien, and of course such prior executions must be first paid off, in the same manner as prior mortgages must be paid off first, when sales are made upon subsequent ones. It was further insisted, that the practice hitherto had been to pay off prior executions, which had not been renewed, upon sales forced by younger executions; and it was the duty of the court to support such a practice, as by far the greatest part of the personal property sold under execution since the year 1785, was appropriated in this manner, to the eldest executions first. That to unravel such a multitude of cases, and call in question such a mass of property as would be affected by doing away such a practice, would be throwing the country

1798.

*Snipes*  
v.  
The Sheriff  
of Charleston  
District.

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Snipes  
v.  
The Sheriff  
of Charleston  
District.

into a prodigious scene of confusion and distress. The cases the counsel relied on, were 2 *Bac.* 362. *Carth.* 2 *Show.*

*The Court* took time to consider, and afterwards delivered their opinions, *seriatim*.

RUTLEDGE, Ch. J. was of opinion that the execution lost its efficacy at the expiration of the year and day, until renewed by a *scire facias*, and that this had been the former practice in this country.

BURKE, GRIMKE, WATIES, and BAY, Justices, were of a contrary opinion. That the execution did not lose its *binding* efficacy on the expiration of the year and day, only its *active* quality; and that when sales were made under younger executions the goods were subject to all prior ones, and they must, and ought to be, paid off first in order, agreeable to their seniority. That whatever might have been the former practice of the country, they thought the reason and justice of the thing, as well as the peculiar situation of this country since the peace, owing to sheriffs' sales, bills, and instalment laws, which prevented plaintiffs, for years, from recovering their money, justified them (even if it was a doubtful case in point of law, which they by no means thought) to support the practice of the sheriff in paying off the eldest executions first.

Rule discharged.

ATKINSON *against* TEASDALE.January  
Term.

*ASSUMPSIT* for fifty barrels of rice, of the value of 128*l.* 12*s.* 4*d.* sold by one *Fardo*, a factor, who afterwards became insolvent.

Debts due by a factor to a purchaser of rice, &c. cannot be set off in discount against the demand of the original owner, brought by him against such purchaser.

The defence set up was, that the rice was purchased from *Fardo*, and the defendant being in possession of *Fardo's* note, as also of a bond, assigned over to him, he contended he had a right to set them off against the purchase-money for the rice, as in the transaction he had nothing to do with *Atkinson*, the present plaintiff. But

*The Court* (present, RUTLEDGE, Ch. J. GRIMKE, J. and BAY, J.) overruled the plea and discount, being clearly of opinion that the factor, in this case, was only the servant of his principal, and that the property remained in him till actual payment of the money. That payment to the factor, it is true, would have been good payment to the principal, if there had been any receipt to shew it had been made. But, on the other hand again, there was neither law nor justice in favour of the purchaser's setting up a debt due from the factor to him, (much less to third persons, and negotiated to him,) against the fair demand of the original owner. In fact, it would be neither more nor less than robbing one man to pay the debt of another.

Verdict for the plaintiff.





pressed their fixed determination to adhere to their opinions, they were, by consent of the parties to the suit, dismissed.

1793.

Executors of  
Godfrey  
v.  
Forrest

**BULL against HORLBECK.**

*May Term.*

**THIS** was an action of *replevin*. The case was, that one *Cobb* had rented a tenement from the present defendant and avowant; and there being due for rent in arrear 45<sup>l</sup>. he seized the plaintiff's negro, who happened to be found *accidentally* on the premises. So that the simple question was, whether the negro of a third person, accidentally found on the premises of a landlord, could be distrained, for rent due by the tenant, or not?

Any negro slave found *accidentally* on the premises, is distrainable for rent due by the tenant, whether he is the property of the tenant or not.

*Lee*, for the avowant, contended, that by the common law, any and all the goods and chattels found on the premises, were distrainable for rent in arrear. That it was ~~not~~ the business of the landlord to inquire into the right of property of his tenant to any goods *actually* in his possession—it was enough that they were on the premises; otherwise it would be easy for a tenant to collude with another, exchange property for a few days, until he could move from a house, and thereby defeat the right of the landlord to this summary mode of redress by *distress*. That it had been the constant practice in this country heretofore, to consider negroes found on leased premises as liable to a distress.

*Pringle* and *Desaussure*, *contra*, admitted the doctrine contended for, as to every species of personal property, excepting *negroes*. As to them, the common law could not apply, because slavery was unknown in *England*, from whence we borrowed the principles of the common law; consequently, such a species of property could never have been in the contemplation of the common law. The doctrine of slavery was a part of the civil law, and incorporated

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Bull

v.

Hoflbeck.

into the policy of this country from high considerations of necessity and utility. Every rule, therefore, respecting slaves, must be taken from the civil law, or governed by the local circumstances and situation of *South-Carolina*. The law of distress was unknown to the civil law. Upon the local situation of this country alone, then, the case should be governed. They further urged, that it would be extremely inconvenient, indeed, to the citizens of this country, if the doctrine contended for were to prevail. That negroes had a volition, or will, of their own, and could not be restrained from going into a neighbouring plantation, or inclosure, and mixing with other negroes. To subject them, therefore, under such circumstances, to the rigid doctrine of distress, if found on premises occupied by a tenant, would not only be unjust, but contrary to the sound policy and general convenience of the state. Even in *England*, for the public advantage, and general convenience, personal property, in a variety of situations, was exempted from distress ; as, corn in a mill—wool at a neighbouring barn. 2 *Burr.* 1500. Cloth at a taylor's shop—horses at an inn, &c. So, in the same manner, for the public convenience, negroes ought to be exempted. Our courts had already, in some instances, modified the doctrine by saying that a negro, bound out as an apprentice, should not be liable ; (*Phelon v. M<sup>r</sup> Bride, ante* ;) neither should goods at a vendue store. (*Himely v. Wyatt & Richardson, ante.*)

*The Court*, in charging the jury, differed in opinion.

The CHIEF JUSTICE, and GRIMKE, J, were in favour of the avowant, and mentioned to the jury, that negroes circumstanced like the present plaintiff's, had always been considered as liable to distress. That the doctrine had often been recognised, and they did not consider themselves at liberty to depart from it at this day, notwithstanding there might be some apparent inconvenience and hardship in the case.

BAY, J. was of a contrary opinion. He could not conceive that the common law ever contemplated this kind of property. If it had, he doubted not but it would have formed one of the exemptions from distress. An owner had a perfect command over every other kind of goods and chattels, so that they could not easily go into the inclosure of another against his consent. But negroes had a will of their own, and the strictest watching could not, at times, prevent them from visiting their acquaintances in a neighbouring plantation or yard. Tradesmen's negro apprentices were striking instances of the necessity of such exemptions; and he was of opinion, that the same rule should extend to hired negro tradesmen of every description, and all other negroes belonging to third persons.\* As to the practice hitherto established, it was so manifestly against common reason and justice, that no acquiescence in it could sanction the principle. The sooner, he thought, it was rectified, the better.

The jury found for the plaintiff. The verdict has been acquiesced in, and the case often relied on since, though no more solemn decision has ever yet taken place on the subject.†

\* *Vide* the case of *Broden v. Pierce*, cited in 1 *Vern.* 131. where cattle coming by escape out of the neighbouring grounds, held not to be distrainable.

† See act of assembly passed in *December*, 1799, by which negroes or slaves of third persons are exempted from distress for rent, &c. so that such exemption forms a part of the law of *South-Carolina* at this day.

1793.

  
Bull  
v.  
Horlbeck.

May Term.

The Legatees of *Ash* against The Executor of *Ash*.


A mortgage does not lose its lien on the land for want of recording, so as to give subsequent judgments a preference. And the mortgagee may elect to go against the land, or bring his action for the money produced by the sale thereof, under the subsequent judgment, as for money paid away by mistake.

CASE for the residue of an estate, also for monies had and received.

The right of the plaintiffs in this action, was not disputed, and the accounts on the part of *John Ash*, executor of *Joseph Ash*, deceased, were admitted to be proper. The only ground of contest was, the *laches* of the defendant, as was alleged, in not recovering a bond from *John Berwick* to his testator, given in *December*, 1778, conditioned for the payment of 31,000*l.* currency, and also in not recording a mortgage made to secure payment of the bond, by which neglect, it was said, the debt was lost.

From the plaintiffs' evidence it appeared, that *Berwick* purchased a tract of land from the defendant's testator, in 1778, and gave the bond above stated for the consideration money, together with a mortgage of the premises. That *Joseph Ash* lived till 1780, when he died; and after his death, the defendant, *John Ash*, qualified under the will. That *Berwick* remained solvent till his death, which took place some time in 1784; and after his death, his estate was considered as solvent till 1788, when it was discovered that the assets would not be sufficient to discharge the debts. In the mean time, sundry judgments were obtained, some against him in his life-time, and others against his estate after his death. In consequence of which, executions were issued, and the whole of the estate sold to satisfy the judgments, and among other parts of his real estate, the premises he purchased of the defendant's testator. That during all this period, the defendant never commenced any suit to recover this bond, nor had even taken the precaution to record the mortgage, which would have secured the plantation (for which the bond was given) from subsequent judgments; by means of which neglect or delay, on the part of the executor, the plaintiffs alleged, they had lost the whole amount of the said sum of 31,000*l.*

and interest from *December*, 1778. That when the land was about to be sold by the sheriff, under and by virtue of the executions, the defendant was present, and did not forbid the sale, or inform the sheriff of the bond and mortgage, but suffered the land to be purchased by the creditors.

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 Legatees of  
 Ash  
 v.  
 Executor of  
 Ash.

*Pringle*, on behalf of the plaintiffs, argued, that in this case there was so glaring a neglect or *laches*, on the part of the defendant, as made him clearly liable. That the principal part of the duties of an executor was, to collect the debts, and recover the rights of his testator. That wherever a man takes upon him any duty or trust, he is bound to perform it *faithfully*; and if any damage accrue by his default, he was liable. It was unnecessary, he said, to cite a series of authorities to support this doctrine, for none was better established, and more consonant to sound sense and reason.

On the part of the defendant, it was alleged, that the testator himself had been guilty of the *laches*, in not recording the mortgage in his life-time, as he had lived sixteen months after it was given. It was further alleged, that at the time of his death, the country was in the utmost confusion, the *British* troops being then before the *lines of Charleston*; and that he himself, in the midst of the hurry and tumult of the day, incautiously put the bond and mortgage among his old papers, where they remained undiscovered till 1791. So that the defendant never had the bond to put in suit till it was too late, nor the mortgage to record until after the sales were made. In support of this allegation, *Thomas Jones* was called as a witness, who proved, that in *July*, 1791, he assisted the defendant to arrange the papers of the estate, and in looking into a trunk which contained a number of old papers for sixty years back, they found the bond and mortgage. He believed they were then, for the first time, discovered by the defendant. He also proved, that at the time of the sale of the land, the defendant told him he had a mind to purchase it, as he said there was a demand against *Berwick's* estate. Another

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Ash.

witness proved, that when the land was advertised for sale, the defendant endeavoured to stop it ; that he searched for the mortgage, but could not find it. On the closing of this testimony,

*Pinckney*, for the defendant, admitted, that in cases of great or wilful omissions on the part of executors, in not recovering the rights of their testator, the law would charge them ; but such was not the case here. There was no culpable omission whatever ; and it would be hard indeed, to make executors liable for not discovering deeds and papers mislaid by their testators. He next contended, that the mortgage did not lose its lien on the land, by any subsequent judgments. That the *act for preventing double conveyances*, said nothing about judgments, nor did it fix any period to the duration of the lien which a mortgage had on the lands. It only directed, that the mortgage or deed *first* on record, should have the preference. That if the plaintiffs chose to recognise the sale made by the sheriff, and give up their lien on the mortgage, the money might still be recovered back, as paid by mistake ; or they might *foreclose* the mortgage, and have the land sold under it to satisfy the debt. So that they were not without remedy, notwithstanding the delay which had been occasioned by these papers being so long mislaid.

RUTLEDGE, Ch. J. mentioned, that there did not appear to be any culpable omission in this case, on the part of the defendant, so as make him chargeable. That there was every reason to believe, that the deeds had been mislaid by *Ash* in his life-time. At least, it did not appear that they ever came to the knowledge, or into the hands of the defendant till 1791. That, at all events, the plaintiffs' mortgage had not lost its lien, by the entering up of subsequent judgments. That although judgments bind from the time of signing them, yet they must be understood to be subject to all prior incumbrances. The mortgage was not void, by not being on record. The only risk the mortgagee ran, was the chance of another deed from *Ber-*

*wick* for the same land, being put on record before the mortgage in question. If, however, the plaintiffs chose to relinquish their right under the mortgage, and recognise the sale made by the sheriff under the execution, the money might be recovered back from the person to whom it was paid, as money paid by mistake.

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 Legatees of  
 Ash  
 v.  
 Executor of  
 Ash.

BAY, J. of the same opinion.

Verdict for defendant.



ATKINSON *against* The Executors of SCOTT.

May Term.

DEBT on a bond conditioned for payment of an indent for 1,267l. 3s. 6d. in September, 1786.

*Rutledge* stated to the court, that at the time this bond was given, the testator, *Scott*, agreed that if the indent was not returned on the day mentioned in the condition, that then it should be converted into a specie debt, to be paid for at the rate of pound for pound; and offered to call a witness to prove the agreement.

*Pinckney* objected to this testimony on two grounds: first, because it had a tendency to alter the face of a deed under seal, by parol testimony. And secondly, because it would have the further effect of turning a fair contract into a usurious one, which would defeat the plaintiff from the justice of his claim. With respect to the first objection, he said, it was an established rule of evidence, that parol testimony shall never be admitted to vary, or substantially alter, the tenor and effect of a deed under seal. 2 *Black. Rep.* 1249, 50. *Stra.* 794. For if it was once admitted, that *suppletory* or *explanatory* evidence should be received to supply and explain written contracts and agreements, it would introduce all that uncertainty which the statute of frauds was

Changing an indent from its real to its nominal value in specie, when it was worth only 8 1-2 for 1, will make the contract usurious.  
 Parol testimony against the face of a bond, to prove any such agreement, is inadmissible.

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 ~~~~~  
 Atkinson  
 v.  
 Executors of  
 Scott.

so well calculated to prevent. As to the second objection, it was evident from the nature of the testimony offered that it would make the contract usurious, and in the end defeat the object of the plaintiff entirely ; for, he observed, that the current value of indents in *September, 1786*, was at the rate of 85*l.* for 100*l.* specie ; so that 150*l.* would have done more than purchased indents to the amount of those specified in the condition of the bond. But according to this proposed proof of a contract, it would have required instead of 150*l.* 1,267*l.* 3*s.* 6*d.* So that there would have been a clear profit of upwards of 1,179*l.* for the use of 150*l.* for one year. If this was not usury, he did not know what usury was. *It was a shift or evasion, which the law would not countenance or warrant.* And in order to support this position he quoted *Cro. Jac.* 507. where it is laid down, that any shift to take more than *five* per cent. is usurious, be what it may. Our act of assembly, passed in 1776, made the interest seven per cent. but in other respects it was the same as the *British* act. Indents were considered as the stock of *South-Carolina*, and stock was a species of merchandise as much as rice and indigo here, or flour or wool in *England*. The value of stock, he said, was what it would bring at market. In *Ambler's Reports*, 37. 371. a contract was deemed usurious, because five per cent. was charged on 100*l.* when the value of stock was 75*l.* So in 2 *Stra.* 1242. the discounting a note at a greater rate than five per cent. was deemed usurious, because it was deemed a loan. From the whole of the authorities it was evident, that wherever there was an attempt to turn stock into its nominal value, or to take more than the legal interest for the use of money, by any device or pretext whatever, it made the contract usurious.

*Rutledge*, in reply, said, that this should be considered as a *specie* contract, and not a contract for the sale of stock. That the plaintiff would not have parted with it upon any other terms, and it would be hard to prevent him from having the full benefit of his contract.



*Per Cur.* This kind of testimony, which is intended so materially to alter or vary a deed, cannot be admitted, because it would be productive of all the mischiefs and uncertainties which the statute of frauds has so wisely guarded against. And, indeed, the contract, if proved, as the plaintiff states, would be manifestly usurious. It would, in fact, be converting a debt of 150*l.* into one of 1,267*l.* 3*s.* 6*d.* which is so evidently usurious, that it must strike every mind at the first blush. But the contract on the face of the bond in this case, appears fair: 1,267*l.* 3*s.* 6*d.* appears to have been borrowed by the deceased, and that sum was to be repaid in indents in *September*, 1786. The value of indents at that time and interest, is what the plaintiff is now entitled to, and no more. The case of *Davis v. The Executors of Richardson*, (*ante*,) and many others, are in point on this head.

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Atkinson  
v.  
Executors of  
Scott.

Verdict for plaintiff accordingly.

MILLER and ROBERTSON *against* RUSSELL and others.

*May Term.*

CASE upon a policy of insurance, tried before a special jury.

The defendants in this action were underwriters upon a policy of insurance on the brig *John*, whereof *John Howell* was master, bound to *Jamaica*. There was insured on the vessel the sum of 350*l.* and on the freight 150*l.*

It appeared in evidence, that the brig sailed from *Charleston* in *October*, 1792, and on her voyage sprung a leak, which

tion on the voyage make it void, if occasioned by stress of weather, accident, or to avoid an enemy, or the like.

Where a vessel is staunch and properly fitted for sea before she sails out of port, the springing a leak, or other accident at sea, afterwards, will not vitiate the policy of insurance. Nor will a deviation unavoidable

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Miller and  
Robertsonv.  
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others.

admitted so much water into the vessel, that it was with the utmost difficulty the hands on board, together with three others they got from on board a *French* vessel, could keep her afloat. That falling to the leeward of the island of *Jamaica*, they were obliged to put the vessel about, in order to avoid a small island, and croud all sail upon her, which drove her upon a reef, where she was lost.

The defendants set up several grounds of defence :

1. That the brig was not in a proper condition for sea when she sailed, and consequently, there was not a proper representation of her condition before she proceeded on her voyage. That it was the duty of the master to see that the ship or vessel was seaworthy, before she sails ; and that an omission of this kind on the part of the master, vitiated the policy. That in this respect, he was the agent of the owners, and his neglect affected their right of action.

2. That there was a deviation from the due course of the voyage, which had she pursued, she might have made a port and been saved.

3. That an unreasonable sum was insured on her.

For the plaintiffs, in reply, it was admitted that it was the duty of the master to see that his vessel was seaworthy, before she proceeded on her voyage ; and that a deception or misrepresentation on that head would affect the policy : but they contended, in this case, (and one or two witnesses proved,) that the brig had been repaired, and put in as good order as usual, before she sailed, and that there was no default or misrepresentation on the part of the master.

On the second ground, it was not denied but that an alteration or deviation in the voyage, might affect such policy, if such deviation was not the effects of necessity ; but wherever urgent necessity required it, for the greater degree of safety of the vessel and cargo, it was otherwise.

With respect to the last ground, it was proved that the sums insured on the vessel and freight, were not unreasonable, or out of the course of trade, therefore it was not pressed.

*The Court*, in charging the jury, told them there were two points for their consideration, as the third ground seemed to be given up ; first, the good condition or seaworthiness of the vessel before she went to sea. Secondly, the conduct of the captain. Should they be of opinion, from the testimony, that the vessel was not in a proper condition, it would vitiate the policy ; as good faith on these occasions was essentially requisite. That the insurers could receive the necessary information, from no other quarter than from the master or owner ; and if they represent a ship to be stout and staunch, and every way equipped for sea, when in fact she is not—that is such a misrepresentation as will exonerate the underwriters. On the contrary, if they should think the brig was in good order, and fit for sea when she sailed, then the defendants undertook for every risk afterwards. With respect to the second point, it was clear that every unnecessary deviation or departure from the voyage, equally with the unfitness of the vessel for sea, made the policy void. But where such deviation was owing to stress of weather, unavoidable accidents, or with a view to avoid an enemy, or the like—then every such case formed an exception to the general rule.

Verdict for plaintiffs.

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Robertson  
v.  
Russell and  
others.

May Term.

Mrs. BOGIE, Widow of BOGIE, against RUTLEDGE.

A widow who joins her husband, in his life-time, in a mortgage to secure the purchase-money of a lot of land, but afterwards refuses to go before a judge to acknowledge it, is not entitled to dower; because the instantaneous seisin of her husband, to enable him to make the mortgage back, makes it a conditional estate, till the purchase-money is paid.

UPON a motion to shew cause why the defendant's claim for dower should not be set aside, and her petition under the act of assembly, dismissed.

The facts, as stated and admitted, were, that the plaintiff, *Rutledge*, sold a lot of land in *Charleston*, to *David Bogie*, deceased, and the conditions of the sale were, that the purchaser should give bonds for the payment of the consideration money, payable by instalments, with a mortgage on the premises to secure the payment. After the terms were agreed on, *Rutledge* made the usual conveyances of lease and release in fee, to *Bogie*, for the lands; and *Bogie* and his wife (the present applicant) joined in a mortgage, to secure payment of the bonds given for the purchase-money, which bore date as usual, the day after the conveyances for the lot. It happened, however, that at the time the mortgage, lease and release were executed by *Bogie* and wife, Mrs. *Bogie* was indisposed, and could not then wait on a judge to surrender her right of dower in the land, agreeable to the conditions of the sale, but promised to do so after she recovered. In this situation matters remained for a considerable length of time, till *Bogie* died. After his death, the widow petitioned the court of common pleas, under the act of assembly, for her dower; and the only point for the consideration of the court was, whether, under these circumstances, she was entitled to it or not?

*Rutledge*, as counsel for the plaintiff, and in support of the motion, relied on three grounds:

1. That it was one entire contract, made upon a condition which formed an essential part of it, and which rendered the bargain incomplete, until such condition was performed.

2. That the instantaneous seisin of the husband at the moment, was only to enable him to make the mortgage back to the seller, to secure payment of the purchase-money; and

the fee, consequently, never could be considered as absolute in him, till the consideration was paid, but only a conditional one; and if so, then the widow clearly was not entitled to dower.

3. That if the fee could be considered absolute in *Bogie*, yet, under the circumstances of the case, it was a fraud on the part of the wife, after joining with her husband in the mortgage, to refuse after his death, to go before a judge and surrender her dower agreeable to her promise, and she should not be allowed to take advantage of her own wrong.

Upon the first ground, he submitted the case to the court, upon the plain and obvious principles of justice, and the essential parts of every contract, contending particularly, that wherever a contract was made upon certain specific conditions, it was not complete till those conditions were performed. That one of the conditions in the present case, was, that the land should stand pledged to *Rutledge*, the seller, till the consideration money was paid. It formed a part of the original contract, and although no mention is made of it in the release to *Bogie*, yet it ought to be recollected, that this release formed only a part of the contract, which is expressly referred to by other parts of the same contract, to wit, the mortgage—and is not to be taken separately by itself. And then, when the whole is taken together, and all the deeds viewed, as forming different parts of one entire contract, it must appear evident that *Bogie* had only a *conditional* estate, and not an *absolute* one, till the consideration was paid. 2. Under the second head, he compared the present defendant, *Bogie*, to the widow of a copyholder, and cited the case of *Sneyd v. Sneyd*, 1 *Atk.* 442. where the master of the rolls laid it down, that the instantaneous seisin of the freehold of the purchased copyhold estates in the husband, will not entitle his widow to dower. He also compared her to the widow of the conusee of a fine, and to the widow of a trustee. That a conusee of a fine was a person to whom lands are conveyed in a court of record, in order to dock entails, &c. upon condition that he

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will immediately reconvey the lands back again, to the conusor, to him, his heirs and assigns for ever, which converts an estate tail into a fee-simple. In this case the widow is not entitled to dower. *Co. Litt.* 38, 39. So also in estates conveyed in trust for the use of another, the widow of the trustee shall not be entitled to dower. 2 *Lill.* 624. 3. As the third ground involved in it a matter of fact, the counsel declined going into it, until he heard the opinion of the court on the two first.

*Lee* was concerned for the widow in support of her claim, but did not go into an argument, probably because it appeared to him to have been one entire act; and such a momentary seisin, as under the circumstances of the case, did not entitle her to dower.

The CHIEF JUSTICE being the plaintiff in this case, left the bench as soon as the motion was made. The two remaining judges,

BURKE and BAY, after considering the case, were of opinion, for the reasons and authorities urged against the motion, that the widow was not entitled to dower in the lot in question, and accordingly directed her claim to be dismissed.

N. B. This point has been frequently determined in our courts since the above decision, that widows of mortgagors were not entitled to dower. See *Crabb v. Maccomb*, vol. 2.

JACKS *against* SMITH.

May Term.

IN an action of replevin, the defendant *Smith*, avowed the taking of the goods for rent in arrear, and produced a deed from one *Kerr*, of the premises, to the defendant, but offered no written lease to the plaintiff, *Jacks*, nor any evidence even of a parol lease. He rested solely on the right or conveyance of the land in question, from *Kerr*.

Distress will not lie, unless upon some lease, written or parol, upon which some rent certain is reserved.

For the plaintiff, it was contended, that he came into possession of the premises under a lease from one *Bourke*, a former proprietor, to whom he had regularly paid his rent; that the house was attached for *Bourke's* debts, and purchased by *Smith*; and that there was no privity of contract between him and *Smith*, of course that he was not answerable in this way, by distress, for any rent that became due after *Bourke's* title ceased, and he became the owner.

*The Court* (present, the CHIEF JUSTICE, BURKE, J. and BAY, J.) were decidedly of opinion, that there must be some lease, either *written* or *parol*, to justify a distress. Some sum certain must be reserved, for which the landlord can enter and seize the tenant's goods in this summary method. Though they thought an action for use and occupation, would lie against the tenant, for the time he held the house after it was sold.

*Harper*, for plaintiff.

*Read*, for defendant.

*Vide* the case of *Smith v. The Sheriff of Charleston District*, post.

The STATE *against* LITTLEJOHN and BERRY.

Where two or more are indicted *jointly* for a riot and assault, the court will not consent to their being tried separately.

THE defendants were indicted *jointly* for a riot and assault on Dr. Fayssoux.

Holmes, their counsel, moved that they might be tried separately. But

*The Court*, after hearing argument in support of his motion, and the *attorney-general*, *contra*, refused it, as it would have a great tendency to favour combinations of men to swear for and acquit each other in joint offences ; and also to split up and multiply issues, which might all very properly be combined in one trial, where the offences were joint. But if, after the witnesses against them had been examined, it should appear that no specific charge was proved against any one of them, he might move to have such defendant struck out of the indictment, and then he would be at liberty to examine him ; but not before the witnesses for the state had been all examined, and before it was evident nothing appeared against him.

*The Court* were more especially induced to refuse the motion in this case, as the defendants were also charged by one count in the indictment, for a riot, which was an offence of a *complicated* nature, where the act of each was imputable to the other, and tended to constitute one single offence. So that if one were to be examined as a witness for the other, there would be no conviction *singly* of either ; as two or more must be convicted to make the conviction good for the offence of a riot.



STONE, Guardian of Three Minor Children, *against* May Term.  
EBBERLY.

TROVER for a negro boy. This case came before the court on a special verdict found in the year 1790, as follows :

"That *Mathew Guerin*, (whose daughter, *Thomas Stone*,  
"the present plaintiff, married,) by deed of gift, gave sun-  
"dry negroes to his three grand-children, *Thomas Stone*,  
"the younger, and *Elizabeth* and *Mary Stone*, all minors  
"and under age, share and share alike, and among others,  
"the boy in question. That *Thomas Stone*, the eldest of  
"the grand-children, came to *Charleston*, and contracted  
"several debts with tradesmen, being then about twenty  
"years of age ; and having gone off to *Georgia*, the boy in  
"question, who had attended him as a waiting man, was  
"attached as his property, and afterwards sold by the  
"sheriff under the attachment act, in order to satisfy his,  
"young *Stone's*, debts. At this sale, the present defendant  
"became the purchaser of this negro boy. And whether  
"this sale, being a *public* sale, and made *under the sanction*  
"of law, to a *fair bona fide* purchaser, for a valuable con-  
"sideration, would bar the plaintiff of his right of action in  
"the present suit ? was the point submitted to the court.  
"If it did, then the jury found for the defendant ; if not,  
"then for the plaintiff, with costs."

Trover will  
lie for a negro  
bought at a  
sheriff's sale,  
against an in-  
nocent ven-  
dee, who pays  
a valuable con-  
sideration for  
him.

The case underwent several ingenious arguments.

For the plaintiff, it was compared to sale made in *market overt*, where the thing sold was secured to the purchaser at all events. That it was a sale made by operation of law, under a public act ; and to defeat the purchaser of his purchase, would have a tendency to clog sheriffs' sales exceedingly, and would lessen the value of property brought to sale upon those occasions. That the defendant was a fair purchaser, had paid his money, got the sheriff's bill of sale, and ought to be secured in his purchase ; otherwise,

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he would lose his money, which he had fairly paid away, under the sanction of the proceedings of our courts of justice, which otherwise might be calculated to entrap and deceive unwary purchasers, &c.

On the other hand, it was contended, that young *Stone* was a minor, incapable of contracting, except for necessities, which was not even alleged. But admitting he was of full age at the time, no property in the negro was ever vested in him. The property was in *Stone*, the father, as guardian, till his children came of age, and a division made among them. And if no property was in him, then it was not liable to his debts. That the negro was attached by mistake ; and the mistake of the sheriff, or plaintiff, could not divest the original owner. That it was clear law, that if the sheriff seizes and sells the goods of *A.* for the debts of *B.* trespass will lie against him. That the inconveniences would be greater to the community, in giving a legal sanction to such mistaken sales, in selling the goods of innocent third persons, than it would be in subjecting the property in the hands of an innocent vendee, to the action of trover. One of the great objects of the laws of civil society, was to protect persons in their property, wherever it should be found. To give the case, therefore, the construction contended for by the defendant, would be converting the law into an engine of oppression, in depriving one of the very property it was bound to preserve and protect. Besides, the defendant was not remediless, for he might recover his money from the plaintiff in attachment, who had received his money by mistake : whereas, if the sale was confirmed, the younger children of *Stone* would be without remedy. The case against the sheriffs of *London*, 1 *Burr.* 31. was principally relied on for the plaintiff,

*The Court*, (present, the CHIEF JUSTICE, BURKE, J. and WATIES, J.) after a full consideration of the case, were clearly of opinion, that the action of trover would lie against the vendee, as the property still remained in *Thomas Stone*, the father, as guardian of his children ; and no mis-

take or tortious act of the sheriff, could divest innocent third persons of their property, lawfully acquired.

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v.  
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The *postea* delivered to the plaintiff.

*Pringle and Ford*, for plaintiff.

*Pinckney and Taylor*, for defendant.



The Administrators of HUGER, *late* Sheriff, against  
OSBORNE, *present* Sheriff.

*May Term*

THIS was an action of *assumpsit* for sheriff's fees ; and the points submitted to the court were the following, viz.

1. Whether in cases where executions are lodged, and levies made, the sheriff becomes, under the instalment law, entitled to the whole fees, or only part, and what part ?

2. Where, on executions lodged, the words "*levied on residue, if any, after paying off prior executions,*" are indorsed, this shall be considered as a proper levy on the defendant's goods, &c. and whether any, and what fees shall be allowed thereon ?

3. Whether, on executions not subject to the instalment law, but where no actual sale is made, he is entitled to any, and what fees ?

4. Whether any other proof of levy is necessary, than the return of the sheriff on the execution ?

These points were all fully argued by counsel, after which,

*The Court* took time to consider, and all the judges were of opinion upon the first point.

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Adm'rs of  
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1. That in all cases where the sheriff had made actual levies of the defendant's goods, &c. for the instalments due, but had not proceeded to sale, he was entitled to his fees and *half commissions on all sums actually recoverable under the instalment law*. And in cases where security had been demanded and refused, and where the sheriff had in consequence thereof, proceeded to sell part for cash, and part for bonds, pursuant to the terms of the act, there he was entitled to his fees, and to whole commissions on the debt.

The return of a sheriff, that he had levied on the residue of defendant's goods, after paying off prior executions is void for uncertainty. Sheriff could not maintain trover or trespass for taking away the goods on such a return.

2. That an indorsement on the back of an execution, in the manner mentioned, of a *levy on residue*, after paying off prior executions, *is no levy at all*. It may be ten times as much as the debt due, or it may be nothing; or it may be casting a net over all a defendant has in the world. It is too vague and uncertain to be warranted in law. Executions are separate, distinct things, and do not refer to each other. Besides, the sheriff could not maintain any action on such a levy, if the goods were taken away, or sold to a third person. A list or schedule of the property actually levied on by name and description, ought to be annexed to, or entered on, the back of the execution, and signed by the sheriff, or his lawful deputy, in order that the property may be identified, if necessary. By virtue of the levy or seizure, the goods are vested in the sheriff; so that he can maintain *trover* or *trespass* for them. But how is it possible that he can support an action, unless the goods, &c. are particularly enumerated. And although they remain in the defendant's hands, *after* levy, yet they are supposed to be in the sheriff's custody; for the defendant is as the agent for the sheriff, after a levy made. How could the plaintiff issue out any new execution, in case of a rescue? Or again seize them, or send out a *venditioni exponas*, &c. unless they were specifically enumerated, so as to enable him to pursue, or retake them wherever found. Again, it is by no means clear that a sheriff would not make himself liable, by such an indefinite return of the property, should it be afterwards taken away, and it should appear that there was enough

to pay the debt. For it is laid down in 2 Saund. 341. that where a sheriff returned, he had by his officers, seized goods, to the value of 160*l.* which were rescued out of his custody, and the defendant had no other goods, the sheriff was made answerable, because the return was ill—no specific property being mentioned, which the plaintiff could pursue; or against which he could issue a *venditioni exponas*. But a great inconvenience which would attend this indefinite levy, would be, that a defendant never could sell any part of his property whilst an execution was unsatisfied, for fear the property so sold might be taken as part of the property levied on. Purchasers too would be unsafe, as there could be no telling what part of a defendant's property was seized, and what part clear. For all which reasons, the return ought to express with precision, every thing levied on, or at least, as much as is *sufficient* to *satisfy* the debt, but *no more*. Otherwise it cannot be considered as a levy; and if no levy, then no commissions are payable.

3. That in cases where levies were made, which did not come under the instalment law, but where the whole was payable, the sheriff is entitled to half commissions on the whole debt.

4. That the return of the sheriff, with a list of the property so ascertained as above, on the back of an execution, was *prima facie* evidence of the property seized and levied on, so as to bind it for the payment of the debt.

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v.  
Osborne.

A list of the property levied on should be returned on; or a schedule annexed to the execution.

## CASES IN THE SUPERIOR COURTS

TEASDALE *against* KENNEDY, Sheriff of Charleston District.

If a sheriff takes a householder, in apparent good circumstances, as bail, he will not be liable to a special action, though the bail turn out insolvent. But if he takes one *notoriously* insolvent—one in doubtful circumstances—or one not a fixed resident, he will be liable.

SPECIAL action on the case, for taking insufficient bail.

*Taylor*, for the plaintiff stated that he had commenced a suit for the plaintiff, in 1788, against one *Wagner*, of *Georgia*. That an affidavit of the debt was annexed to the writ, and it was indorsed for bail, to the amount of 76*l.* 6*s.* 8*d.* That one *M. Farlane* became bail for the defendant in the action. Judgment was regularly obtained against the defendant, and afterwards, on a *scire facias*, against the bail, who turned out insolvent. This was therefore an action instituted against the defendant, for taking insufficient bail, by which means the plaintiff lost his debt.

*M. Farlane* himself was produced as a witness, who proved that at the time he became bail, he was a shopkeeper, paid 70*l.* a year rent, had a store of goods, and a landed property, which he had since sold for 200*l.* and further, that he had a bond and mortgage put in his hands to counter secure him.

*Pinckney*, for the defendant, urged, that as sheriff of the district, he had done all that was incumbent on him as a public officer to do. He had taken a man as bail, who was at the time, in apparently solvent and in good circumstances; a householder, and one that had, to every appearance, a permanent residence. That it was not the duty of a sheriff, to inquire minutely into a man's private concerns, or to warrant his solvency. He conceded, that if a sheriff will take as bail, men *notoriously* insolvent, men in doubtful circumstances, or men who have no fixed residence; that in such a case he would be liable; because it would not be using that diligent attention and caution which the law has imposed upon a sheriff as a duty annexed to his office. So, on the other hand, were a sheriff to refuse bail, where the party offering appeared to be in good circum-

stances and repute, it would subject him to a special action on the case, for oppression in office. That at any rate, it was the duty of the plaintiff to have taken out a rule upon the bail, to make him justify, and if he refused, then it would have been a good ground for the sheriff to have taken better bail.

*Taylor*, in reply, said, that the reason why he did not call upon the bail in this case to justify, was because he heard the sheriff tell the plaintiff, who complained of the insufficiency of the bail, that he need not be afraid of his debt, as he had in his hands, property of *Wagner's* to three times the amount of it, and desired him to go on and get his judgment. In consequence of which declaration, he rested satisfied, and went on with the usual proceedings, both against the principal and bail, till they turned out insolvent; and now contended, that the action would lie against the sheriff on two grounds: first, for taking insufficient bail; and secondly, on the ground of the sheriff's assurances that he had property more than enough to satisfy the plaintiff's demand.

*By the Court.* Every man who undertakes an office, ought to perform the duties of it strictly, and to use all due diligence and care in the execution of it; particularly a sheriff, who is an officer of great trust; and if any man, on account of his omission or neglect, suffer by it, he is liable in damages. But on the other hand, where he discharges his duty faithfully, he is highly protected in law. In the present case, the law has been very properly stated on behalf of the defendant. If a sheriff takes as bail, a man who is notoriously insolvent, in doubtful circumstances, or without a fixed residence, or the like, he is answerable. But where a man is a householder, in apparent good circumstances, to refuse such a man as bail, would be an abuse of office, for which he would be answerable. Here it does not appear that the sheriff acted improperly in taking the bail he did. As to the other ground, if the jury should be of opinion that the plaintiff lost his money by the assurances

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of the sheriff that he had enough in his hands to pay the debt, they may charge him; but if it was only a conjecture that he would have so much, or if the funds were such that he could not detain them, it would be hard to make him liable.

Verdict for defendant.

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Term.

TIMROD against SHOOLBRED.

Selling for a sound price, warrants against all faults and defects, known or unknown to the seller. And although a man does not warrant the longevity of a negro, yet if he had the seeds of a disorder in him at the time of sale, the seller is liable in case of his death.

THIS was an action of *assumpsit*, brought for the value of a family of negroes sold at public auction, viz. a fellow called *Stepney*, a ploughman, his wife, a young wench, their daughter and her child, bid off at 170*l*. It appeared, in evidence, that *Stepney*, the ploughman, broke out with the small-pox, the day after the sale, and died; and, consequently, must have taken the infection previous to the day of sale. The defendant offered, before this action was commenced, to pay for the other negroes, provided the plaintiff would deduct the price of *Stepney*, who was the principal object of the purchase, or to return the others of the family; but the plaintiff refused to accept either of these proposals, and chose to rely on his action for the whole price. It was also proved that the negroes were taken from a house where the small-pox had been, but it did not appear that the plaintiff knew that either of these negroes had taken the infection.

*Ward*, for the defendant, argued, that it had been repeatedly determined in this court, that soundness of price amounted to a warranty of soundness of goods, and that the juries of the country were bound, in justice and common honesty, to support and maintain this doctrine; otherwise, innumerable frauds might be practised by one citizen on another, in their usual transactions. That fraud might arise



from circumstances as well as from premeditation, in one of the parties in the contract. That although the plaintiff might not have known, at the time of sale, the defect of the negro, yet, if he had the infection at the time, (though unknown,) it would be a fraud on the defendant, to oblige him to pay for a dying negro, who had the disorder at the time of purchase. That there was a manifest distinction between an action for *deceit*, and *assumpsit*. The former implied a knowledge of the defect, and an imposition on the part of the seller ; consequently, vindictive damages might be given. The latter supposed that the defect might be unknown to him ; in which case, the value only was recoverable. That the defendant, in this case, acted only on the defensive ; but whatever was good ground for an action, if the money was paid, was good ground of defence when a demand was made for the purchase-money.

*Marshall* and *Lee*, in reply, urged, that this was a casualty that human prudence could neither guard against nor foresee. That the plaintiff had no knowledge of the indisposition of the negro ; therefore, there could be no fraud on his part. That if a seller was to be made answerable for every accident or indisposition to which a negro might be subject after a sale, there could be no such thing as a valid one ; every contract of that kind would be liable to be set aside. Such sales would become the constant sources of litigation, of which it was difficult to foresee any end. That the kind of warranty which the *receipt of a sound price* raised in law, on the part of the seller, on the sale of a negro, or other property, was of a two-fold nature : the first relates to the title, that it was a *good* one ; the second to the *qualifications*, that the negro answered the description given of him. But it could never be construed so as to extend to longevity, or that he should live an hour or a day after the sale.

*The Court.* (Present, BURKE, J. and BAY, J.) In every contract all imaginable fairness ought to be observed, especially in the sale of negroes, which are a valuable species of property in this country. It has been decided, often, in our courts, that selling for a sound price, raises, in law, a

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warranty of the soundness of the thing sold ; and if it turns out otherwise, it is a good ground for the action of *assumpsit*, to recover back the money paid. *Powell*, 150. This warranty extends to all faults, *known* and *unknown* to the seller ; and although, in general, it principally relates to *title* and *qualifications*, and not to *longevity*, yet, in some cases, it ought to be construed to extend to the latter. For if the negro sold had about him, at the time of sale, the seeds of a disorder generally difficult of cure, and which occasioned his death, it would be unreasonable to say that the purchaser shall sustain the loss. Though if the disorder had been contracted afterwards, it must be at the risk of the purchaser.

The jury returned a verdict for the plaintiff, deducting the amount of the negro, *Stepney*.



The Administrator of BELL against The Administrators  
of HUGGINS.

DEBT on bond, dated the 18th *May*, 1773, for 1,000*l* old currency.

*Pinckney*, for the defendants, stated, that the bond in question was given for a tract of land on *Santee* river, purchased by the intestate, *Huggins*, in his life-time, and that the *indenture* of release was dated on the same day with the bond. That part of the land in question, which was valuable rice swamp, was claimed by the heirs of one *Daniel*, deceased, by virtue of a grant, so long ago as the year 1705, and that *Bell*, the seller, claimed under a grant many years subsequent to *Daniel's*. That on the deed from *Bell* to *Huggins*, there was a receipt indorsed in a very special manner, by which the grantor promised to refund the con-

sideration-money, in case a better title should appear. He then contended, that although the receipt, on the back of the deed, would of itself be sufficient to entitle the defendant to a verdict, yet, there was a covenant in the deed, *that he, the grantor, Bell, was lawfully seised of a good estate in fee, &c.* upon this he chose to rely on the present occasion. The law, he said, was clear, that an action would lie on this covenant, whenever a defect of title was discovered, even before eviction by suit at law. (*Wood. Conv.* 403, 4. *Pringle v. Executors of Witten, ante.*) And if the action of covenant would lie in such a case, the defendants, when sued on the bond for the consideration-money, could plead it in discount, and set up the value of the land taken away by the elder grant against the plaintiff's demand on the bond.

A surveyor was then called, who proved the lines, and that part of the land was taken away by *Daniel's* elder grant, but that the injury would not be so great as to defeat the main object the purchaser had in view, when he purchased. Whereupon the jury, by direction of the court, deducted the value of the land so taken away by the elder grant, from the amount of the bond, and gave in favour of the plaintiff, a verdict for the balance.

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Bellv.  
Adm'rs of  
Huggins.

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Term.

The ORDINARY OF CHARLESTON DISTRICT against  
CORBETT & LIGHTWOOD.

If the effects of an intestate are carried off by an enemy, after administration committed, it shall exonerate the securities to the administration bond, who are only to be considered as collateral undertakers, dischargeable by the performance on the part of the administrator, or by the act of an enemy, which prevents them from performing.

THIS was an action of debt, brought against the defendants, who were securities in an administration bond, for *Luke Stoutenburgh*, administrator of *William Stoutenburgh*, deceased.

To this bond the defendants pleaded a performance of the condition. The assignee of the ordinary, *Richard Wainwright*, produced the inventory of the deceased's estate, to the amount of 24,169*l.* 1*s.* 6*d.* currency, which, it was said, charged the administrator; and as he had filed, or rendered, no account of his administration, it was contended, that he made himself liable to the amount of the appraisement, and, consequently, that his securities were chargeable for that sum.

For the defendants sundry witnesses were called, who proved that during the war, when the *British* general *Prevost's* army invaded this country, the plantation of the intestate was broken up—all his negroes carried off—his house burnt—and near 800 ounces of plate taken away; so that the estate was wholly ruined by the devastation of the enemy. And that *Luke Stoutenburgh*, the administrator, died during the confusion of the war, before it was in his power to make any due or regular return of his administration to the ordinary's office.

The counsel for the defendants then contended, that as this estate became insolvent by the casualties of war, and not by default of the administrator, the securities to his administration bond could not be chargeable in law, but were discharged from their obligation by the act of an enemy, which rendered it impossible for the administrator to perform. That the securities never could be supposed to be answerable for the *solvency* of an estate, only for the *good* conduct of the administrator. That in this case there was no fault in the administrator. That the act of God, or the

act of an invading enemy, will excuse a man from the performance of any duty whatever. That if the negroes had died by famine or disease, the administrator would have been excusable ; and so as they were carried off by the enemy, he was, in contemplation of law, excusable also, which is tantamount to a performance of the condition in the bond.

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Ordinary of  
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District  
v.  
Corbett and  
Lightwood.

RUTLEDGE, Ch. J. in charging the jury, said; that this bond was for the performance of covenants on the part of the administrator ; and that the defendants, his securities, were to be considered as collateral undertakers. That it was a well known rule, both of the civil and common law, that if the party performs, or if it is rendered impossible for him to perform, that in either case, both he and his securities shall be exempt from the penalty annexed to the obligation ; and that the act of God, or of an enemy, were the highest excuses known in law for the non-performance of a contract.

The rest of the court concurred, WATIES, J. being absent.

*Pinekney and Pringle*, for the plaintiff.

*Rutledge and Desaussure*, for the defendants.

September  
Term.

HALL against SMITH.

When a note is indorsed over after it becomes due, the rules with respect to due diligence are inapplicable. During the existence of the instalment law, the local circumstances of the country ought to be taken into consideration, which would be of great weight in determining the jury on the present occasion.

CASE on a promissory note, against the defendant as indorser. The defence was *laches* in the holder, in not endeavouring to recover the money from the drawer.

To rebut the force of the defence, the plaintiff gave in evidence the insolvency of the drawer, which was not disputed; but the case turned upon the supposed neglect of the holder, in not recovering before the drawer became insolvent. It was admitted, that if the suit had been commenced for *January* return, 1790, the debt would have been paid.

It appeared on the trial, that this note was negotiated by the defendant to the plaintiff, on the 19th of *November*, 1789, some time after it became due; and on the day following, he placed it in the hands of an attorney of the court for recovery. The attorney, as was customary, wrote a letter to the drawer, but did not receive an answer until after the return day of the following *January* term; in consequence of which, the suit was not commenced till the return day in *March*, 1790. The instalment law then in force, required a demand of security thirty days before a suit could be commenced, and it was customary to lodge writs against persons residing in the country, ten days before the return day. The question was, therefore, whether, under these circumstances, the holder, or his attorney, could be chargeable with such a neglect as would destroy his right of action against an indorser.

RUTLEDGE, Ch. J. This is a matter which turns upon the use or neglect of due diligence, which is a subject very proper for the consideration of merchants, in which the course and usage of trade in this country, as well as its local situation, ought to be brought into view, and duly weighed. In *England*, where there are great monied capitals, and banking establishments, from whence money can at all times be

easily drawn to answer the purposes of trade, by men in good and solvent circumstances, a greater degree of strictness is observed, than can easily be established in this country ; especially among planters, who can only bring their crops to market at one season of the year, and who are often obliged to sell them on a credit to the merchants ; who are, on the other hand obliged, from the nature of trade, to give large credits to the planters. In this kind of mutual intercourse then, the strict rules observed in *England*, with regard to promissory notes, are not altogether applicable to the local situation of *Carolina*. The great question for the jury, therefore, in this case, is, whether a *reasonable diligence has been used or not* ? Such as a prudent man, in his ordinary affairs, would observe, where his own interest only was immediately concerned. But it must be recollected also, that this note was indorsed over, after it was due, and therefore the law presumes in such case, that the indorsee took it upon the credit of the indorser, and not upon the credit of the drawer. (3 *Durn. & East*, 80. 83.) It is in such case considered as a new drawn note, by the indorser. Under these circumstances, therefore, although the indorsee may recover against the drawer, it is not subject to such strict rules as a note would be which was indorsed before due. In every such case, the indorsee himself must have given indulgence to the drawer, before he negotiated it ; and it would be hard indeed, if the holder should suffer for a further reasonable indulgence afterwards, which the indorser himself had shewn before he indorsed it. Besides, the instalment law altered the nature of proceedings here exceedingly. The very end and design of it was to create delay, and to throw obstacles in the way of recovering debts. Upon the whole, I am clearly of opinion, that instead of an unreasonable delay, very unusual diligence has been used. Of this, however, the jury are to judge.

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Hall  
v.  
Smith

BURKE, J. of the same opinion.

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Hall  
v.  
Smith.

BAY, J. coincided, but grounded his opinion principally on the circumstance of the note being indorsed after it became due, which made all the rules respecting due diligence inapplicable.

The jury, without retiring from the box, returned a verdict for the plaintiff.

### HARRISON *against* STROTHER.

Under the county court act, titles for lands are to be recorded in the county where the lands lie. But as to negroes and other personal property, the purchaser may record his bill of sale in any part of the state he pleases.

TROVER for a negro called *Jack*. On the 10th of *May*, 1786, one *Kemp Strother* mortgaged five negroes to *John Vanderhorst*, since deceased, one of whom was the negro in question; and which mortgage was on the 11th of the ensuing *September*, duly recorded in the secretary's office, in *Charleston*. On the 7th *October*, 1786, *Kemp Strother* sold the negro *Jack* to the plaintiff *Harrison*, who recorded his bill of sale in the office of the clerk of the county of *Fairfield*, on the 18th of *June*, 1791. The defendant, *William Strother*, claimed under the mortgage from *Kemp Strother* to *Vanderhorst*. So that the only question was, who should be preferred?

*Hunt*, for the plaintiff, contended, that as the parties resided in the county of *Fairfield*; as the contract was made between the plaintiff and *Kemp Strother*, in that county; and as the plaintiff's bill of sale was first on record, in the clerk's office there, he was entitled to a preference under the 45th and 47th clauses of the *county court act*; notwithstanding the mortgage to *Vanderhorst* was recorded several years before in the secretary's office in *Charleston*. That the records of the counties were the proper places to search for incumbrances on property, since the establishment of county courts. That all mortgages and deeds *from the inhabitants* of the county, ought to be recorded in the county;



and unless this construction was given to those clauses in the act, no person would ever be safe in a purchase of this species of property, until he searched the clerk's office of every county and district in the state.

To this, on the part of the defendant, it was replied, that those clauses in the county court act, giving a preference to deeds first on record there, related only to lands and other real estates. They were in their nature, permanent property, which could not be removed out of the limits of the county. It was therefore proper in the legislature to require that all mortgages and deeds for lands, should be recorded in the county where they lie, in order to quiet the inhabitants of the counties in the possession of their lands, and make it easy for them to inquire and know whether there were any, and what incumbrances on them. But as to negroes and personal chattels, they were in their nature transitory, and therefore the policy of the law was not to require any local registry of the transfer of them. The act is silent as to personal estate; and deeds and contracts for chattels, must and ought to depend upon the *conveniency of the purchasers, for whose safety and advantage they were made*. A registry of them in any part of the state most convenient to the purchaser, is sufficient. And such deed or transfer for negroes or other personal estate, first on record in any part of the state, ought to have a preference.

WATIES, J. was decidedly of opinion, that the clauses of the county court act, quoted by the plaintiff's counsel, related only to lands lying within the different counties; and that they could not, by any construction whatever, be extended to negroes or other personal property, which in their nature were transitory. The best rule therefore in every case of a purchase of this kind of property, would be to leave it to the *conveniency of the purchaser, to record his deed where it suited him best; and every such deed*

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v.  
Strother.

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first on record, *in any part of the state*, ought to have a legal preference.

BAY, J. coincided.

Orangeburgh  
District,  
Nov. Court.

A pardon for a particularly specified offence shall not operate as a pardon for a prior felony not mentioned in such pardon.

The STATE against M'CARTY.

THE prisoner *M'Carty*, was convicted of *horse-stealing* upon very clear testimony. His counsel however moved, in arrest of judgment, that he had a pardon from the governor, under the great seal of the state, for an offence committed subsequent to the present one, which it was contended, operated as a pardon for this offence also. Upon which he was ordered up to *Columbia*, agreeable to the terms of the constitution, to have the point argued in his presence. He was accordingly brought up to *Columbia* on the 1st of *December* following, when the CHIEF JUSTICE and all the JUDGES were present. The motion was then renewed, and the point fully argued by

*Holmes and Deas*, for the prisoner, and

*The Solicitor of the southern circuit*, for the state.

The Court having heard the counsel on both sides very fully, and having perused and inspected the pardon produced, which appeared to be a special one for the particular offence of which the prisoner had formerly been convicted, were all unanimously of opinion, that it did not operate as a bar to the prosecution for the present offence, or any other not particularly mentioned in the governor's pardon.

Sentence of death was then pronounced on the prisoner ; but as the jury had recommended him to mercy, he received a second pardon.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURTS OF COMMON PLEAS**  
**AND**  
**GENERAL SESSIONS OF THE PEACE, &c.**  
**IN THE YEAR 1794.**

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JOHN and WILLIAM HEYWARD and others *against*  
HAZARD and others.

*January  
Term.*

THIS was an action of trespass, to try titles to lands under the will of *John Heyward*, of *Tick-Town*, deceased, upon the issue of *devisavit vel non*, before a special jury at bar, by consent of parties.

The will in this case contained two kinds of devises or bequests, viz. one of real estates, and the other of personal property.

The probate of wills, or in other words, the *trial of their validity* as to personal chattels, belongs exclusively to the court of ordinary, which is governed by the ecclesiastical rules. But their validity as to lands, is only cognizable in the common law courts, by the principles of the common law, which considers them as a species of conveyance. For which reason, it was foreseen that it might so happen, that the court of ordinary might give a construction to it one way, and a court of common law a different construction; so that there might be contrary decisions on the same will,

The witnesses to a will are called not only to attest the fact of signing, but also to determine the capacity of the testator, that is, whether he was sane or insane, at the time of executing such will.

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v.  
Mazard.

and upon the same point, in the different courts. To guard therefore, against this clashing of jurisdictions, it was mutually agreed upon by the parties interested, to try this question at once, by a special jury, at bar in *Charleston*, before the common law judges; where it was supposed it would receive a more solemn and full investigation, than before a single individual, the ordinary of *Beaufort* district, in which the whole estate lay.

The cause came on the 6th and lasted till the 11th of *March*. All the judges present.

The defence was the *insanity of the testator*.

*Holmes*, in his opening, on behalf of the plaintiffs in the action, stated, that they claimed the lands in question under the last will and testament of *John Heyward*, deceased, a near relation of the plaintiffs, dated the 8th of *January*, 1793. That the testator lived till the 12th of *January*, when he died. That in and by this will, he had left the bulk of his estate, consisting of lands and negroes to a very large amount, to *John* and *William Heyward* of *Tulifinny*, two first cousins; and to *Mrs. Glover*, wife of *Wilson Glover*, his sister, all plaintiffs in the action. That in *December*, 1791, the testator had made a prior will, in which he gave the bulk of his fortune to the defendant, *Major Hazard*, who was also a first cousin of the testator by the mother's side, and to *Mrs. Glover*, one of the parties in the present suit. So that in fact, *Glover* and wife would be very little affected, which ever way the action terminated, as they could claim nearly to the same amount under either will. The real dispute then, he said, was between the two *Heywards* of *Tulifinny*, and *Major Hazard*; and this depended entirely upon the validity of the *last* will, the *former* will having been made when the testator's insanity had not been called in question. He then stated that the three witnesses to the will were in court, ready to prove the execution of this last will, and the sanity of the testator at the time it was executed. But as some of the defendant's witnesses, who had been *subpœnaed*, had not arrived, on account

of the badness of the weather, whereupon the case was adjourned to the day following.

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*Friday, 7th March.* As soon as the jurors were seated and called over, the cause was resumed, when *Holmes* called

*George Hinson*, the first witness to the will, who, being sworn, said that he saw *John Heyward*, of *Tick-Town*, sign the will produced and shewn him. That he subscribed his name to it, as a witness, in the presence of the testator ; at least, in the room where the testator was, and who might have seen him. He appeared to him to be then perfectly in his senses, as much so as he had known him to be for six years before. That *William Skilling*, *David Motte*, *Wilson Glover*, and *William Heyward*, were all in the room at the same time. That when he, the witness, went into the room, he asked the deceased how he was, who answered, he was so ill he could not shake hands with him, being much swelled, but bid him to take a chair, and sit down. The deceased then said to him, he looked ill ; he replied, and said he had been sick.

Upon his cross-examination, he said, Mr. *Heyward* was in his senses when he signed his will, otherwise he would not have witnessed it. That the will appeared to have been written by Mr. *Glover*, who was the person who asked him if he would not sit up, and sign the paper. That he had not seen the deceased from the month of *November*, preceding, till the 8th of *January*, the day he witnessed the will ; he lived four or five miles off ; he had been sent for, but did not know for what purpose. That, on the way to the deceased's house, he met Mr. *Malory Rivers*, who had just left it : he asked how Mr. *Heyward* was ? he said he was better. When he went into the house, he found Mrs. *Rivers* at breakfast, who soon after went away. The will was signed about two hours afterwards. He had seen him often intoxicated with liquor, but he had no appearance of it when he signed the will.

## CASES IN THE SUPERIOR COURTS

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*William Skilling*, another witness to the will, was sworn. He saw this will signed, and placed his name as a witness to it, in the room with Mr. *Heyward*, and where he might have seen him. He appeared to be perfectly in his senses, otherwise he would not have witnessed it. The deceased said he began too near the seal, which obliged him to put the word "*jun.*" on the seal. (*This appeared to be the case.*)

Upon this witness being cross-examined, he said, he lived on a plantation of Mr. *Thomas Heyward's*, father of two of the plaintiffs, about the distance of one mile and a half from the deceased's. Mr. *William Heyward* sent for him the night before—went in the morning, very early—did not see the testator till he was called to witness the will. When he went, in the morning, Mrs. *Rivers* was there, but went away some time before he was asked up to see the will executed. The paper was not read to him; he did not read it himself. The testator did not call it his will—only said he acknowledged it as his act and deed; but verily believes Mr. *Heyward* knew it to be his will. He thought it was his will. That *Hinson, Motte, William Heyward, and Glover*, were there when the will was signed.

*David Motte*, the third witness to the will, said, that his name to the will was his hand-writing. That he saw *John Heyward* sign his name, and deliver it as his act and deed; and he subscribed it as a witness, on a half chest of drawers. That *William Heyward* offered to get a table for the witnesses to sign their names upon, but *John Heyward*, the testator, said there was no occasion—pointing to the half chest of drawers, said they might sign their names on that. That he was perfectly in his senses—had known him for eleven years before—had lived on the plantation; and would not have witnessed the will, unless he had been convinced in his own mind he was in his senses. He wished very much for chocolate, and expressed his surprise that people did not bring that article up into the country for sale, which was much better than many articles they did bring up for sale.

Upon his cross-examination, this witness said he lived on the plantation of the deceased, as a shoemaker and saddler—had an account against the estate, for jobs done in both lines—had not seen him for a fortnight before he was sent for to witness this paper—did not wish to disturb him by going up stairs, having a wooden leg—never heard him raving for a fortnight before the will was made. He had frequently been intoxicated before his death ; particularly about *Christmas* he saw him raving about the plantation, in liquor. He was soon after taken sick, and never went about afterwards. He thought the paper to be Mr. *Heyward's* will, and verily believed Mr. *Heyward* knew it to be his will when he signed it.

Here the direct testimony for the plaintiffs closed, the counsel observing, that they had other testimony to offer in reply to the defendants' witnesses.

*Ford*, in behalf of the defendants, stated, that under the plea of insanity, it was not altogether necessary to prove that the testator was entirely deranged at the time the deed was executed ; but if it appeared that, by long habits of intoxication, the mind was rendered unfit for so important a transaction as that of making a final arrangement of his worldly concerns, or if he was in that state of weakness that he was liable to be influenced by the importunities of those about him, it was sufficient to support the plea. That the evidence they were about to offer, was to that effect ; and if it turned out as he was instructed it would, the defendants would unquestionably be entitled to a verdict.

*Major Jenkins* was then called as a witness. He proved that he had been intimate with the deceased for some time before his death. That he had been frequently at his house in 1791 ; that he was often indisposed. That, during that year, he heard him speak often of *Major Hazard*, and in warm terms of friendship for him. He sometimes spoke of getting his will made, and said he would made him a warm fellow yet. In 1792 he was frequently at the house of the deceased ; that he was, in the course of the year, much indisposed, at which time *Major Hazard* was very

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vinced him he was deranged. He struck a dozen blows against the wall, with his hands, thinking it was his man *Ben* whom he beat, and behaved in such a manner as convinced the witness he was out of his senses. He left the house of the deceased the day the will was signed ; he was then better—bade him good-bye—did not think he was then in a situation to do business. He heard nothing about a will before he left the house—did not ask him to stay and see it signed, although he had mentioned his intention of going off. He met *Hinson* on the road after he had left the house. *William Heyward* went to the deceased's house the second day after the witness went, and attended him till his death, and paid him all the attention of a kind friend, and kept him from liquor, and employed *Dr. Houser* to attend him.

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*Mrs. Rivers* went with her husband to see the deceased on *Christmas* day, 1792 ; stayed a fortnight ; saw him drink water for grog, and play tricks, which induced her to think he was deranged. Saw him strike at a shadow against the wall. That the greatest part of the fortnight she was there, he was out of his senses, though he was sometimes in his senses ; she left the house the eighth of *January*, but heard nothing about a will ; when she left him in the morning, he appeared to have an interval of reason. Upon the oath she had taken, she did not think he was in a situation proper to do business.

*Doctor Campbell*, about six months before the testator's death, heard him say he had made a will, and left his estate to *Major Hazard* and *Mrs. Glover*. He had fits occasionally, owing to hard drinking—once saw him in one ; when he recovered from them, he was fit to make a will. He was accustomed to get drunk, and continue so for a fortnight or three weeks together.

*Dr. Pepper* saw the testator on the 7th of *December*, 1792, at *Black Swamp*, and heard him say the *Tulifinny* family should have nothing to do with his affairs. He made an agreement with him at that time, about some land.



times he was perfectly in his senses, and as fit to do business as any other man.

Mr. *Quickly* was then called and sworn. He said he went to see the testator on the 1st of *January*, 1793; went up stairs into his room, conversed with him about eighteen half barrels of rice, which were to be put on board Captain *Tucker's* vessel, for *Charleston*; but he said he had thought of taking them down in his own boat himself; he was perfectly in his senses. Saw him again on the 10th of *January*, and he was as perfectly in his senses as he had ever known him to be. He had lived with him for some time as an overseer. He inquired about his plantations, and the witness gave an account of them to him. He drank hard, and was apt to be deranged or flighty, but he would again recover his senses.

Sundry letters written by the testator in the summer of 1792, were then produced and read, and they all appeared to be sensible, well written letters; and two as late as the 3d of *December*, 1792, one to Captain *Tucker*, and the other to *Ball & Minot*. In the letter to Captain *Tucker*, he informed him he would have a parcel of rice ready to send to *Charleston* by the 18th of the month. And in the letter to *Ball & Minot*, his factors, he advised *them* of it also, and desired them to get some articles from Mr. *Ewing*, and send them up to him. Captain *Tucker's* deposition corroborated the above facts; and further, that he had frequent fits of intoxication, but would recover again.

Dr. *Baron* attended him in the spring of 1792, he was very ill, staid at his uncle *Thomas Heyward's* house, where he was taken great care of. He was sometimes out of his senses, and at other times again perfectly sensible; so much so, that he would have no hesitation in witnessing his will, if he had been called upon for that purpose.

*John Witchard* was in the testator's employ, saw him the last of *December*, 1792, he inquired about his plantations, and gave him some directions about one particularly, from which the negroes had been removed, and said some person should be left there to take care of the buildings; he

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then appeared to be perfectly in his senses. *Mrs. Rivers* came to his house on the 8th of *January*; (the day the will was signed;) he inquired of her how *Mr. Heyward* was, she answered he was much better and perfectly in his senses. He sometimes had drunken fits, but would recover again.

*Mrs. Witchard.* *Mrs. Rivers* paid her a visit on the 8th of *January*, 1793; she inquired how *Mr. Heyward* was; she, *Mrs. Rivers*, said he was much better, and perfectly in his senses; adding, that he was so brave, that she believed they were about making a will. She said she met *Hinson* going there.

*Robert Ewing's deposition* was read, in which he said *Mr. Rivers* told him that *Mr. Heyward* was perfectly in his senses on the morning of the day the will was signed. That he said so several times, and that he, *Rivers*, believed the will would hold good.

*Ewing Richardson* deposed, that he heard *Mr. Rivers* tell *Mr. Adam Ewing* that *Mr. Heyward* was in his senses, the morning he left him.

*Adam Ewing* proved that *Rivers* told him the testator was in his senses the day he left him. The witness asked what day it was; he replied it must have been the day the will was signed, as he met a young man going there who was a witness to it.

*Mr. Russel* confirmed *Mr. Ewing's* testimony.

*Thomas Heyward*, the testator's uncle, saw his nephew on the 4th of *January*, 1793; he was in bed, but was sensible; he was so much so, as to be able to transact business, for he called to see whether he could pay his son a sum of money he had advanced for him. He said he had sent 170 barrels of rice to town, but he ordered the proceeds to be paid to *Colonel Skirving*, who had been a very indulgent creditor towards him. The witness saw *Mrs. Rivers* there; his nephew said there was some troublesome company there: he mentioned it to *Mrs. Rivers*, who got into a violent passion about it. He saw him again on the 10th of *January*; he was then in a good state of mind,

and entertained hopes of recovery ; he was able to sit up in a chair. He saw him again on the 11th, and in the morning of the 12th of *January*, 1793, and he appeared at those times to be sensible. Indeed, he said, all the fits he ever had, proceeded from hard drinking.

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Here the evidence closed on both sides.

*Harper*, for the plaintiffs, then proceeded to observe to the jury, that the only question for their consideration was, whether the testator was insane or not at the time the will was made. That a man generally insane, if he has lucid intervals, may make a will, and it shall be deemed good. That where there is a contrariety of evidence, it is to be presumed in favour of sanity. (*Orphan's Legacies*, page 24.) That reasonable dispositions to men's nearest friends and connections, ought to be supported ; but if given to strangers, were very suspicious. That in this case, the estate was given to his nearest friends and relations ; though others were unnoticed. That the plaintiffs were very near relations, and stood in equal degree with the defendant, Major *Hazard*. In the first will, the two *Heywards* were unnoticed. Why ? Because the testator, when that will was made, did not think proper to give them any thing ; but the will would not have been less valid on that account, if the latter one had not been made. In the latter will, Major *Hazard*, probably, for the very same reason, unfortunately was passed over unnoticed in his turn. The moment of signing the will is the time to which the attention of the witnesses is drawn ; not what was his state of mind at any time before. 4 *Burn. Eccl. Law*, 90. That is the critical moment. Supposing the witnesses then honest men, how little need they know about it. They need not know it was a will ; they need not be together. A paper folded up and signed, but the hand and seal acknowledged, was deemed a good will. 4 *Burn.* 83.

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*Monday, March 10th.* The case resumed.

*Ford*, for the defendants. The time of *making* a will is very different from the time of *execution*. In all probability, this will was drawn several days before the day of its execution. The cutting off Major *Hazard*, without leaving him a shilling, is strong evidence of insanity, after having, so short a time before, left him the bulk of his fortune. A testator ought to have judgment, to discern and know what he is about : to be able to answer questions alone, is not sufficient. *Mary Winchester's case*, 5 *Co. Rep.* 4 *Burn.* 45. *Ibid.* 90. The office of a witness, when he comes into a chamber, is to inspect and judge of the testator's sanity. And if it is even doubtful, they ought to refuse to witness it. For which purpose they ought to have an opportunity of judging, which no man can well do, who is only just called upon the spur of the occasion. If, therefore, the witnesses have not had an opportunity of judging, the jury are to judge of the sanity, from all the circumstances. The witnesses in this case had not been long enough about the testator, to form a competent judgment of his situation and state of mind. It does not even appear that the testator knew it was a will ; it was not read to him ; he did not read it himself. The physician who attended him was the most proper person to judge of his sanity ; he ought to have been produced as the best evidence on such an occasion. From the whole tenor of the testator's conduct, and from the length of time he had been indisposed, it is not to be presumed that he could have sufficiently recovered, so as to be capable of doing so important an act as making a will ; though he might have been able to attend to common concerns.

*Holmes*, for the plaintiffs. All that the law makes requisite, has been complied with on the present occasion. Every man is to be presumed of sound mind, and insanity must be proved. A drunken man is considered as a madman, and incapable of making a will while drunk ; but when he becomes sober, he is to all intents and purposes capable.

4 *Burn.* 46. The reading of a will is not necessary, unless to a blind person. The witnesses, by law, are to attest the *sanity* of the testator ; and in this case, they all agree on that point. But even if one had differed from the other two, it would have been good. *Burn.* 70. 74. It was not necessary that the witnesses should know it was a will.

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*Tuesday, March 11th.*

*Pringle.* The meaning of *non compos*, implies a total deprivation of reason ; drunkenness, only a temporary madness ; it is the lowest state or degree of it. A will made in that state is not good ; but if a man gets sober and returns to a proper state of mind, it is valid. 3 *Atk.* 173. 2 *Hawk.* 2 *Burn.* 184. The witnesses are therefore called upon by the statute to try the testator's sanity. *Pow. Dev.* 68. In the present case, the witnesses to the will are very positive on this head, and their testimony has been corroborated by a great number of other witnesses, who are equally positive. Whereas, the witnesses for the defendants are only *negative*, and that too only *circumstantially* so. The only witnesses for the defendants, who speak of the insanity of the testator, at the time of his last sickness, are Mr. and Mrs. *Rivers* ; but they have made declarations to divers persons, which invalidate considerably what they gave in evidence on this trial. For it is a rule of law, that what a witness has been heard to say at another time, may be given in evidence to invalidate his testimony in court. *Loft.* 279. The two *Heywards* had assisted the testator with money at a time when he was distressed ; and it is highly probable that was the true reason why he preferred them in the disposition of his estate to Major *Hazard*. No formal declaration of a will is necessary ; a delivery as a deed is sufficient. 8 *Vin.* 124.

*Pinckney*, for the defendant. The sanity of the testator is the principal point to which the attention of the witnesses is called by the statute. Where a testator never was insane, soundness of mind is ever presumed ; but where he has

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once been insane, sanity must be proved. 3 *P. Wms.* 93. 2 *Atk.* 56. His barely being able to answer questions is not sufficient ; he must be in his perfect senses, and of sound disposing mind and memory. *Swynb.* 77. 82, 112. Publication of a will is *essential*, not a mere *formal* part. *Pow.* 68.

*Rutledge* concluded by observing, that it was the province of the jury to *judge of the credibility of the witnesses* ; that of the *witnesses* to judge of the *sanity* of the testator. That wills differed very much from common deeds on this very account ; for one or two witnesses to a deed, was good ; but with respect to lands, not less than three were necessary to a will, for the purpose of viewing the situation of the testator, inspecting into his state of mind, and guarding against frauds and impositions. That it was impossible for the jury in this case, to judge of the state of the testator's mind, except from the mouths of the witnesses examined. They were not present to see and observe him ; the witnesses were ; and if they believed the witnesses to the will, they were bound to find a verdict for the plaintiffs. Every thing therefore, depended on the credibility of these witnesses : and nothing had been offered in the course of the cause, to impeach or call their credibility in question, and they had no interest at stake upon the issue or final event of it.

WATIES, J. being nearly connected with Mr. *Glover*, one of the plaintiffs in the action, declined giving an opinion.

BURKE, J. mentioned, that in his opinion there were such strong circumstances of insanity about the testator, and had been for some time before this will was signed, that it made it extremely questionable in his mind, whether it merited the sanction of a court and jury or not. That it was difficult to conceive why a man in his perfect senses, who possessed so high a regard and esteem for another as the testator seems to have had for Major *Hazard*, should, in so short a time, without any difference or quarrel, or any ma-



terial change of circumstances, alter his mind so much as to have totally forgotten his old friend and relation. He thought there was no other way to account for it but by insanity, or a want of sufficient energy in the mind of the testator, to resist the effects of influence, in a weak, debilitated state, both of mind and body. But as this depended on matters of fact very proper for the consideration of the jury, he left it with them to determine as they in their consciences thought proper.

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Heyward  
v.  
Hazard.

RUTLEDGE, Ch. J. GRIMKE, J. and BAY, J. were of one opinion on this occasion, and delivered their opinions *seriatim* to the jury. They were to the following effect, viz. That the statute of frauds, which was the pattern for wills for lands, at this day, required "that all devises of lands" should be in writing, signed by the party himself, (or "some other, by his directions,) and attested and subscribed "by three or four credible witnesses at least, in the testator's presence, otherwise to be null and void." It is evident, therefore, that by this act there are four essential requisites: First, the will should be in *writing*; for no *parol* devise will convey lands, as it will goods and chattels. Secondly, it should be subscribed by the party, (or some other, by his direction.) If a man cannot write, or is disabled, another may sign it for him, by his direction. The third requisite is the *attestation*. The true construction of law under this head, had always been, that the act called the attention of the witnesses to the situation of the testator himself; and this particularly relates to his *sanity*. The witnesses are not called upon by the act to attest the mere factum of signing, but the *capacity of the testator*. The business, then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporal act of signing, but to *try, judge, and determine*, whether the testator is *compos* to sign; that is, of a sound mind, as every will, upon the face of it, imports. And, upon every controversy, the heir at law, or other person interested, has a right to a proof of sanity from every one of them

Powell on Devises, 69, 70.

Ibid. 71.

Ibid. 69.  
3 Will. 95.

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Powell, 81.  
8 Vin. 125.

Powell, 90.

Ibid. 712.

whom the statute has placed around the testator. There is no other security but the witnesses, and their integrity. The acknowledgment of the hand and seal of the testator is sufficient, without saying it is his last will and testament, as no particular form of publication is prescribed by the act. The fourth and last requisite is the subscription of the signatures ; and this must be by all the witnesses, in the presence of the testator, or within view of the testator, where he might see if he pleased, as going into a gallery or adjoining room with the door open, or the like. Notwithstanding all these guards, however, this evidence is not uncontrollable when insanity is alleged ; and it is upon this ground the courts of law have permitted the heir at law (or other person, who is materially to be affected by the will) to examine other witnesses, against the attestation of the subscribing witnesses, upon the point of insanity. All the witnesses examined for the defendant were evidently intended to establish that point, against the testimony of the three witnesses to the will ; and it is for the jury, ultimately, to determine on which side the weight of evidence lies. They have proved, beyond all contradiction, as, indeed, the witnesses for the plaintiffs have also done, that the testator was subject to fits of insanity, by hard drinking, some time before his death. But, on the other hand again, they all prove, also, that after these fits were over he returned again to his senses, and was perfectly in his reason. Upon this point the law is clear, that in cases of insanity, brought on by the visitation of God, or by acts of indiscretion, as drunkenness, &c. if the party has what the law calls *lucid intervals*, that is a proper return of his rational faculties, he may make a will. As, therefore, almost all the witnesses, on both sides, prove that he was occasionally deranged, it will be for the jury to determine whether this latter will was executed at a time when he had one of these lucid intervals or not. Upon the whole, however, it appears that the weight of testimony is greatly in favour of the plaintiffs. The three witnesses to the will, all swear positively that he was perfectly in his senses the day it was signed ; and

there is nothing to impeach, in the least, their credibility, excepting the evidence of Mr. and Mrs. *Rivers*, which is, no doubt, invalidated by the declarations they made to several persons, on the day the will was signed, that the testator was much better, and in his senses.

1794.

Heyward  
v.  
Hazard.

The cause was then submitted to the jury, who found a verdict for the plaintiffs, with a shilling damages, so as to establish the will.

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The STATE *against* WOOD.

*January  
Sessions.*

THIS was upon an indictment for an assault, committed on Mrs. *Rouple* by the defendant, with a large stick, with which he gave her several severe blows, and left her speechless on the ground. The defendant justified, and produced evidence that the prosecutrix struck him first, two or three times, with a cowskin. Mrs. *Rouple* then offered to give in evidence, words spoken by the defendant, injurious to her character and chastity; and for that reason endeavoured to justify the first assault.

Upon this point the opinion of the court was taken, when, after argument,

No words  
will justify an  
assault.

Every assault  
will not justify  
an enormous  
battery; but  
every such  
beating must  
be in one's  
own defence,  
and proportioned  
to the nature of  
the injury offered;  
otherwise the  
defendant  
himself becomes  
the aggressor.

The CHIEF JUSTICE, Judges WATIES and BAY, resolved, that no words will justify an assault. BURKE, J. being of a contrary opinion, that the jury ought, from the circumstances of the case, to be let into the whole provocation.

The Attorney-General then contended, that this assault was an outrageous one, committed on a woman, and out of all proportion to the nature of the injury he had received from her; and therefore he ought, on this account, to be considered as the aggressor, and punished as such.

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The State  
v.  
Wood.

For the defendant it was answered, that the prosecutrix brought this injury on herself by beginning the affray, and striking the defendant first, and therefore ought to abide by the consequence.

*By the Court*, unanimously. The general rule of law is, "that wherever the assault or battery proceeds from the plaintiff or prosecutor's own fault, as where he gives the first blow, &c. there it is sufficient justification to the defendant." But there must be, however, in all cases, some proportion between the battery given and the first assault. For Lord *Holt* lays it down as a rule, that the meaning of the plea *son assault* is, that the defendant struck *in his own defence*. *Esp.* 389. So that the degree of resistance ought to be in proportion to the nature of the injury offered; that is, that it be sufficient to ward off such injury, and no more. For the moment a man disarms or puts it out of the power of the aggressor from doing him further injury, he ought to desist from using further violence; and if he does commit any further outrage, he, in his turn, then becomes the aggressor. In *Salk.* 642. a question was, what assault was sufficient to maintain such a plea? Lord *Holt* said, that *Wyndham, J.* would not allow such a plea, if it was an *unequal return*. His lordship then says, that for every assault he did not think it reasonable that a man should be *banged with a cudgel*. That a small blow will not justify an enormous beating, &c. That the meaning of the plea was, that the *defendant struck in his own defence*. And of the same opinion were all the judges on this occasion, and verdict was against the defendant accordingly.

## The STATE against DELYON.

May Sessions.

THE defendant in this case, was indicted under the swindling act, for selling a *blind horse*, as and for a sound horse, excepting a blemish in one eye; when the defendant had been told he was a blind horse, before the sale.

Selling a *blind horse*, as a sound horse, is not an indictable offence; though a very good ground for an action of deceit.

The attorney-general contended, that this was an act of swindling, under the late law for preventing such deceitful practices.

The Court, (present, WATIES, J. and BAY, J.) after hearing counsel in reply, were of opinion, that this was not such a fraud as was indictable, either at common law or under the act of assembly. That it had the appearance of a breach of contract, or rather a concealment of a blemish, (if the defendant knew it,) for which he was answerable in damages in a civil suit. That to encourage a prosecution of this kind, would have a tendency to bring almost every civil injury into the jurisdiction of the court of sessions, which might be extremely injurious in its consequences, to the community.

*Forty-six  
District,  
April Court.*

**GETER against The COMMISSIONERS for TOBACCO INSPECTION, at Campbell-Town Ware-House.**

Where a power is given by an act of assembly to five commissioners jointly to perform certain powers, the act of four of them is not valid; they must all join.

Upon summary convictions the party accused should be heard, the charge should be in writing, and the substance of the testimony on oath incorporated into the body of the convention.

UPON an application for a *mandamus* to restore him to his office as inspector of tobacco, he having been (as alleged) improperly displaced by the commissioners.

On the return of the rule for the commissioners to shew cause why a *mandamus* should not issue to them to restore the applicant to his office,

*Goodwin* appeared on their behalf, and took an exception to the jurisdiction of the court. He alleged, that these commissioners having been appointed to an office unknown to the common law, created by an act of assembly, for the purpose of inspecting tobacco, that they were not amenable to the ordinary tribunals of justice. That they were nominated by the legislature, and responsible to that body for their acts and proceedings, who alone was capable of removing or punishing them for misbehaviour.

*Ramsay*, in reply, was stopped by

**BAY, J.** who observed, that he would never sit in the court of sessions and suffer its authority over any of the inferior officers of any department in the state, to be called in question. That although the office of a commissioner for the inspection of tobacco, was an office unknown at common law; yet it was a well known maxim, that whenever an act of parliament creates a new office, unknown before, the moment an officer is appointed to fill the place, that instant he becomes subject to control of the supreme tribunals of justice; and if he misbehaves, he is liable to punishment for such misbehaviour. Or if he abuses or exceeds his authority, the court of sessions can correct that abuse, and compel the newly created officer to do justice. That it was the province of the legislative branch of the government, to make laws and create offices; but it was the province of the judiciary alone, to construe them, when

made, and keep the officers within the bounds of duty, when once appointed.

*Goodwin* then proceeded to shew for cause, that by the twenty-fifth clause of the tobacco inspection act, it is enacted, "That if any inspector shall neglect to give reasonable attendance, at all reasonable hours, or shall be guilty of any *mal practices*; each inspector so offending shall be removed by the commissioners," who are empowered to appoint another in his room; "provided, that no such removal shall be lawful, unless the inspector shall have liberty to make his defence, and an opportunity allowed him to disprove the charge alleged against him." That in pursuance of the powers given in this clause, the commissioners had removed *Geter*, the present applicant. The charges against him were,

1. For purchasing tobacco.
2. For charging 1s. 6d. for coopering; when in fact he did not perform the work, it being coopered by the owner.

The record of the conviction being called for, and produced,

*Ramsay* took two exceptions to it:

1. Because the conviction, and consequent removal upon it, had been the act of four of the commissioners only; whereas, by law, five were appointed. That the power given them was a joint power. There was no authority given by the act to a majority to act; nor provision for survivorship: so that no act of their's was legal, unless the whole five had joined in it.

2. That even if the whole five had joined in this conviction and removal, yet there was a glaring defect upon the face of their proceedings, as no witnesses appeared to have been sworn to prove the facts of which *Geter* was accused. Nor did the commissioners reduce to writing the tenor of what was even said on the trial, whereby it might appear to the court whether they had exceeded their powers, or not.

At this stage of the cause it was suggested, that this was a new case under the act; the first that had ever been

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*Geter*  
v.  
Commissioners for Tobacco Inspection

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Geter  
v.  
Commission-  
ers for Tobac-  
co Inspection.

brought forward; and that as it went very materially to affect the powers of the tobacco inspection commissioners throughout the state, it was proposed by the counsel for the commissioners, to postpone the consideration of this case till the adjourned court at *Columbia*, when all the judges on the circuit would be present; and when the act would have such a construction as would satisfy all parties. Which proposal being agreed to by the counsel for the applicant, the cause was postponed accordingly.

*Adjourned Court, at Columbia, May 7th, 1794.*

Present, BURKE, GRIMKE, WATIES, and BAY, Justices.

The cause was again brought forward, when nearly the same grounds of argument were taken as before.

*The Court*, after hearing the arguments, were of opinion, that as the power here was a joint one, without any authority given in the law to the majority of the commissioners to act, they were bound to give the act a strict construction. For it is a rule in construing of statutes, creating a new summary jurisdiction unknown to the common law, that such act should be construed strictly, nothing to be presumed, which is not expressly given by the act. In this act, the power is given to the five commissioners: the court cannot, therefore, by intendment say, that the act of four commissioners is valid, when the act gives the authority to five. That as to the conviction, it was defective on the face of it; as it did not appear that the witnesses had been sworn, or the substance of their depositions taken in writing, and introduced into the body of the conviction itself, that the court might be enabled to judge of its regularity.

The court further observed, that these kind of summary jurisdictions, without the intervention of a jury, are in restraint of the common law; that nothing shall be construed in favour of them; but the intendment of law is always against them. Therefore, wherever a new or special



power is given by an act, to justices of the peace or commissioners, it must appear that this power has been strictly pursued. And the proceedings must be, as nearly as possible, according to the course of trials before juries at common law; as these justices or commissioners are, on these occasions, put in the place both of judges and jurors. The party accused must be summoned; there must be a specific charge against him; and he must have time and opportunity of being heard in his defence. The witnesses against him must all be on oath, agreeable to the rules of law, and reduced to writing, or at least so much as is necessary to the conviction. And in cases of conviction, there ought to be record of it, under the hands and seals of the justices or commissioners, in which so much of the testimony must be set forth, as will bring the offender under the terms of the law, and evince that they have not exceeded the powers given them by the law. If this is not done in such convictions, the common law will break in upon them, and level all their proceedings.

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Geten  
V.  
Commissioners of Tobacco Inspection.

Therefore, ordered, that a *mandamus* do issue to the commissioners, to restore the present applicant to his office.



WIGG against The Executors of GARDEN.

May Term.

THIS was an action brought upon a bond payable in indents; and the jury in making up their verdict, estimated the value of the indents at the time they were to have been delivered.

Holmes now moved for a new trial, on the ground that the jury had gone upon a mistaken principle, viz. that they ought to have given the value of the indents at the time the contract was made, and not at the time it was to have been

Where a bond is given payable in indents, the true measure of damages is the value at the time they were to have been delivered, and not the value at the time of making the contract.

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Wigg

The Ex'rs of  
Garden.

performed ; which, he contended, was the true measure of damages.

*Pringle* was going into his reply, when

*The Court* (present, RUTLEDGE, Ch. J. GRIMKE, J. WATIES, J. and BAY, J.) stopped him, and said it had been determined over and over again, that in all cases where a bond or agreement is entered into for the delivery of a *specific thing*, the true measure of damages was the value of the thing *at the time* it was to be *delivered*. The case of *Davis v. The Executors of Richardson*, was full in point, and had been decided on wise and legal principles ; and many others since.

See this case,  
*ante*.

Rule discharged.

May  
Sessions.

The STATE *against* THACKAM and MAYSON.

A negro is one of the persons who, in contemplation of law, may, with white men, commit a riot. A sheriff must not make levies at midnight, or improper hours, or he will be deemed a trespasser ; unless under very special circumstances.

A sheriff may justify breaking open a place

THE defendants were indicted for a riot, in entering into the plantation of Colonel *Gervais*, at twelve o'clock at night, in *January* last, and breaking open an inner room in a kitchen, and taking away in a tumultuous manner, sundry negroes, &c. It appeared in evidence, that they took a negro man with them, who was armed as well as the defendant, and that they were the only persons present when this outrage was committed.

The defendants justified under an execution, which *Thackam*, who was a deputy-sheriff, had in his possession, to seize the property of one *Purvis*, of *Ninety-six* district ; and alleged, that the negroes in question, were the producers of inner rooms, &c. to reduce property into possession, if he can get possession or admission into the outer door.

perty of *Purvis*, and had been bound by a previous levy, at the suit of *Andrew Johnston*. *Gervais* had taken them by virtue of a mortgage ; but this mortgage was (as was conceded) subsequent to the lodging of the first execution in the sheriff's office.

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The State  
v.  
Thackam and  
Mayson.

After the evidence for the prosecution was finished, which fully proved the fact of the defendants' going on the plantation at the hour mentioned, with the negro armed, and taking away the negroes, &c.

*Harper* and *Holmes* took an exception to the indictment, and contended, that the first count in it was not supported. It was necessary, they urged, that three persons should be present at the commission of a riot ; and that a *negro slave* was not in point of law, such a person as could be capable of committing this offence, being under the direction and control of his master, who might take upon himself the offence. And as not more than two white men were present, it could at most, be considered only as a trespass, (even supposing they were not justifiable in going on the plantation, at the time and in the manner proved,) and not a riot.

The Court, (present BURKE, J. WATIES, J. and BAY, J.) after hearing the *attorney-general* in reply, were clearly of opinion, that a *negro was, in contemplation of law*, such a person as was capable of committing a riot, in conjunction with white men. That it would be highly improper to suffer a white man committing an enormity, to screen himself under pretext that one of the party was a negro. Besides, it is evident, that a negro was one who was capable of committing an injury. Those were the persons the law had in view, in cases of riots ; and that it was not necessary, men should be possessed of civil rights, to make them amenable to justice for these offences.

The counsel then contended, that it was a lawful act the defendants were engaged in, and that they had a right to enter the plantation of *Gervais* to seize the negroes, at any time they thought proper. That negroes being a species

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The State  
v.  
Thackam and  
Mayson.

of property, that had a volition or power of secreting themselves when they thought proper, or whenever their owners or masters gave them directions for that purpose, it might often happen that no levy or seizure could be made, unless sheriffs' officers had a power of surprising or seizing them at night. That therefore, both the law and policy of the thing, well justified the exercise of such a power, even in the dead of night.

*Pringle, Attorney-General*, replied, that to give a legal sanction to the exercise of such a right, would put it in the power of persons, under the colour of legal authority, to disturb the peace and tranquillity of families, at improper hours; which would necessarily call forth their resentments, and create tumult, and perhaps bloodshed. That the law would by no means warrant a sheriff in making these seizures in the dead of night; for they might and ought to be made in the day time, and at the usual and proper hours.

*The Court* were of opinion, that although the act of the sheriff's officer, in going to make the levy or seizure of the property, was a lawful act; yet such levy or seizure ought to have been made at the usual and customary hours of doing business, and not at midnight, when the family had all been at rest. That this therefore being the case, although it would have been lawful at proper hours, yet being done at the time, and in the manner proved, it was certainly an outrage upon Colonel *Gervais's* family, and as such, might well be considered as a riot. The court, however, in this opinion, did not wish it to be understood, that it was in no case legal and proper for a sheriff to seize negroes at night; for cases might happen, where there would be a failure of justice, if it were not permitted.

*The Court* were further of opinion, that if a sheriff can get peaceably into the outer door of a house, he may break

open inner doors of rooms, or other places, to reduce the property into his possession.

1794.

The State  
v.  
Thackam and  
Mayson.

The jury found the defendants *guilty*; but as it appeared they thought they were on a lawful errand, and had no intention to commit a riot, the court fined them five shillings each.

BLAKELY against BRADFORD.

September  
Term.

THIS case was, that the defendant, who was a cabinet-maker in *Charleston*, and carried on an extensive trade in that line, had gone to *Philadelphia* to engage journeymen. While he was absent, *Blakely*, the plaintiff, applied to a magistrate, and obtained from him a writ of attachment, under the act of 1788, amending the attachment law; and by virtue thereof, had attached goods and wares to a large amount, and by that means, had drawn upon the defendant divers other creditors, who otherwise would have waited till his return.

A magistrate has no right, under the act of assembly, to issue an attachment against the goods, &c. of a person, who, at the time of issuing it, is actually out of the state; but only against the goods, &c. of those who are *in transitu*, or in the act of removing.

*Taylor* now moved to have this attachment quashed, on two grounds: First, because the clause in the county court act to which the law of 1788 refers, and which gives jurisdiction to magistrates to issue attachments, is confined to *persons in transitu*, and does not extend to those who had previously *left the state*. Secondly, because it was signed by a magistrate, and tested by the CHIEF JUSTICE, which he alleged was irregular; as no writ could be tested by the CHIEF JUSTICE, unless under the seal of the court.

The Court, however, waived going into the irregularity of the attachment; but took it upon the first ground, and were clearly of opinion, that the proceedings ought to be

1794.

Blakely  
v.  
Bradford.

quashed ; because, the clause in the county court act, obviously related to those only who were in *the act of removing*, or who *concealed themselves* ; and did not extend to those who had notoriously left the state previous to the issuing of the attachment ; and that the very intention of this clause was to give the party speedy relief, where the defendant was going off and had not time for obtaining the ordinary process of law. That this power was a deviation from the common law, and in derogation of the powers vested in the court of common pleas, given to a single justice of the peace. And that in cases where new and extraordinary powers are given to justices of the peace, they shall be strictly construed to be applicable only to the cases specially mentioned.



*Ninety-six*  
*District,*  
*Nov. Court.*

#### STEWART & COMPANY *against* CHILDS.

The *district*  
sheriffs can-  
not serve any  
process rela-  
tive to the  
county courts.

THIS was an appeal from the inferior court of *Abbeville* county, *Ninety-six* district.

On the 5th of *October*, 1792, an attachment was granted by Mr. *Nichols*, a magistrate in *Cambridge*, against the effects of the defendant, *Childs*, for 18*l.* returnable into the county court of *Abbeville*. This attachment was handed to *James Willson*, a deputy-sheriff for the district of *Ninety-six*, who by virtue thereof, seized three negro slaves and sundry household articles, and made a return of them into the county court. A motion was afterwards made on behalf of the defendant, that the attachment and return should be dissolved, as the seizure of so much property for so small a sum, was outrageous and unreasonable in itself ; and because the sheriff of the district, or his deputy, as was alleged, had no authority to serve or return any process issuing from, or returnable to, an inferior court. Upon which the county judges ordered the proceedings to be set

aside ; from whose judgment this appeal was made. The only legal point, however, submitted to the court on this appeal, was, whether the district sheriff was, or was not, authorised to serve an attachment or other process returnable into the county courts ?

1794.

Stewart and  
Company  
v.  
Childs.

BAY, J. was of opinion, that the judgment of the judges of the county court of *Abbeville*, was right, and ought to be confirmed. That the fourth and fifth clauses of the county court act, respecting the service of attachments, referred to the county sheriffs, and to them only, where county courts were established ; and not to district sheriffs, over whom the county courts had no control. That the county sheriffs were appointed by the judges of those courts, and were amenable to them for irregularity or misbehaviour : whereas the district sheriffs were appointed by the legislature, for the purpose of serving the processes of the superior courts, to whom only they were responsible, and who alone could call them to an account, or punish them for any acts of oppression, or omission in office. And lastly, that wherever an inferior jurisdiction was created, and inferior officers appointed to do the duties of such courts, no others shall in law be intended, but such as the *law* prescribes. 3 *Burr.* 1349. 2 *Rep.* 46.

From this decision, there was an appeal to the adjourned court at *Columbia*, where were present, GRIMKE, WATIES, and BAY, Judges, who finally confirmed it.

*Ninety-six  
District  
April Court.*

THOMPSON *against* BULLOCK.

An old deed of thirty years standing, can be read in evidence, without proving the execution of it, or the hand-writing of the subscribing witnesses. It is necessary to prove that possession accompanied it.

Parol evidence to prove the existence of a judgment and execution, is not admissible. The record itself, or an exemplification of it, must be produced.

TRESPASS to try title to 800 acres of land on *Pacolet* river.

*Ramsay* stated that the plaintiff claimed the premises in question, under conveyances from a certain *James Huey*, dated the 2d of *August*, 1791; that *Huey* claimed under one *Clark*, who was the original grantee. The grant to *Clark*, in 1755, was admitted. Next a deed from *Clark* to *Huey*, dated the 1st of *December*, 1763, was produced; but no witnesses to prove the execution of it, or the hand-writing of the subscribing witnesses. *Ramsay*, however, urged, that as this was an old deed, and upwards of thirty years' standing, it ought to be received and read without further proof; and cited *Gilbert*, 99. also *Blackstone*, to the same point.

*Harper*, for the defendant, answered, that although an old deed of thirty years' standing might, under some circumstances, be read in proof; yet it was only where possession had gone along with it; and that it was necessary to prove such possession before the deed could be read.

*The Court* were of opinion, that some reasonable proof of possession ought to be given before the deed could be read. For the reason why the law permitted old deeds to be read in evidence without proof, or the contents of deeds supposed to be lost, or destroyed, to be supplied by other testimony, was, that the proof of such circumstances as could not well have happened without such deeds, was presumptive proof that the old deed is fair, or the one said to be lost, did once exist. *Cowp.* 110.

Several witnesses were then called, who proved, that as long since as the year 1764 or 1765, the land was considered as the property of *James Huey*, the father of *James Huey*, under whom the plaintiff claims. That he let it out to tenants, who held under him. And that *Clark*, in his



life-time, had said he had sold the land to *Huey*; and that *Huey*, and tenants under him, continued to occupy it from the year 1764 or 1765, to the year 1771.

1794.  
Thompson  
v.  
Bullock.

*James Huey* (after procuring a release from *Thompson*) also proved, that his father purchased the land from *Clark*, and *Clark* gave a bond to make titles, and afterwards went to the *Mississippi*, where he remained several years. That *Clark* afterwards returned; but in the mean time, his father had been killed by the *Indians*, and his mother married a second time to one *Looney*. That afterwards *Looney*, his father-in-law, got *Clark* to make titles to him, the witness, for the 800 acres of land, and took up his bond. That he was the eldest son of his father.

After this testimony was given, the court permitted the old deed from *Clark* to *Huey* to be read.

A deed from *Huey* to the plaintiff, dated in *August*, 1791, duly proved and recorded in *Union* county, was next read, which made a regular title in the plaintiff. Other witnesses were called to prove that *James Huey*, who conveyed to the plaintiff, was the eldest son and heir at law of his father, who purchased from *Clark*. So that whether the fee of the land was in the father or son, it was said the title was good.

Here the direct testimony for the plaintiff closed.

*Harper*, for the defendant, then stated, that the land in question is situated in that part of the state which was formerly supposed to be within the *North-Carolina* boundary; that the original grant was under the seal of *North-Carolina*; and that part of the county was supposed to be within its jurisdiction till the boundary-line between *North* and *South-Carolina* was run, when it was found to fall considerably to the southward of the line; consequently, within the limits of *South-Carolina*. That, however, while the lands were supposed to be within the jurisdiction of *North-Carolina*, a judgment was obtained in *Tryon* county, against *Huey*, and the deed in question seized and sold by the sheriff, as *Huey's* property, to satisfy that judgment. That a

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certain *John Knuckles* was the purchaser at the sheriff's sale, who got the sheriff's titles for the same. That *Knuckles* conveyed to *Zachariah Bullock*, the father of the present defendant. He also stated that *Huey*, after the sheriff's sale, gave a confirmatory deed for the lands, to *Knuckles*.

The counsel then mentioned, that he had a witness to prove that there had been a judgment, in *Tryon* county, against *Huey* ; in consequence of which an execution had issued, and the land sold ; and that the sheriff's deed to *Knuckles* had been lost or destroyed.

*Culhoun*, for the plaintiff, objected to this kind of testimony being given, as not being the highest the nature of the case would admit of, and

*The Court* supported the objection, because the record of the judgment itself, or an exemplification of it, under the seal of the court in *Tryon* county, was the highest testimony, and ought to have been procured. And, moreover, that it was necessary to prove that there was such a judgment and execution, before the defendant could go into proof of a sheriff's sale, and deed from him to *Knuckles*.

The defendant then relied upon his deed, after this supposed sale from *Huey* to *Knuckles*. This, however, was rebutted by the plaintiff, who alleged that, at the time when this deed was given, *Huey* was under age, and in some degree, forced to sign it. And to prove the nonage of *Huey* several witnesses were called.

As, however, *Huey* himself had been sworn on the part of plaintiff, he was questioned by the defendant's counsel as to this point, and answered, that, according to his mother's account of his age, which he believes was a just one, he was under age—not more than nineteen or twenty when he signed the deed to *Knuckles*—and that he was forced to do it. Being asked what kind of a deed it was? he said it was a bond to make titles. But afterwards, when he came of age, he got back his bond, from young *Knuckles*, the son

and heir at law of old *Knuckles*, and by his consent made titles to *Thompson*, the present plaintiff, in 1791.

Three other witnesses were next called ; all of whom proved that *Huey* must have been a minor, under age at the time when this bond or deed was given to *Knuckles*.


The defendant lastly relied upon possession ; and produced witnesses to prove that Major *Bullock*, his father, got possession in 1773, and kept it till he died, in 1791.

Here the testimony on both sides was closed.

BAY, J. The fee of the land in dispute has been regularly traced from *Clark* to *Huey*, and from *Huey* to *Thompson*. On the part of the defendant two titles have been set up : First, a sheriff's sale to *Knuckles* ; secondly, a deed from *Huey* to *Knuckles*. The court has already given an opinion on this sheriff's sale. No proof is now before the court respecting it : the jury, of course, can take no notice of it. With respect to the deed from *Huey* to *Knuckles*, it is clear law, that if he was under age at the time the deed was made, it is good for nothing. This must depend, however, upon the nature of the testimony given. It is a matter of fact for the consideration of the jury. But if they believe the witnesses on that head, there can be very little difficulty about it, as they all are clear that he was under age when this deed was made. But admitting that *Huey* was of age at the time this deed or bond was given, it has appeared in evidence that, after the death of old *Knuckles*, he made another deed of this land to the plaintiff, *Thompson*, by the consent and approbation of young *Knuckles*, heir at law of his father, who delivered him up his bond or deed to his father. And this last deed to *Thompson* is first on record ; and, consequently, will have a preference, under the *act to prevent deceits by double conveyances*, &c. As to the possession on the part of Major *Bullock*, which the defendant lastly relied on, it was not carried further back than the year 1773, and therefore cannot avail him ; for it will not give him five

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years' peaceable enjoyment (the time required in the statute) previous to the 1st of *January*, 1775.

Verdict for plaintiff, 3*l.* with costs.



*Orangeburgh*  
*District,*  
*Nov. Court.*

**SCARBOROUGH against GEIGER.**

*ASSUMPSIT* on an acceptance of an order or inland bill of exchange.

The bill was drawn by one *Bradley*, as attorney for *Thompson*, in favour of the plaintiff, on the defendant, as sheriff of *Orangeburgh* district, and payable out of the proceeds of the sale of lands, which the defendant sold as sheriff of that district, which bill was accepted by the defendant.

The defence set up by the defendant was, that funds had never come into his hands to enable him to take up the draft.

It came out in evidence, that the lands had been sold six years previous to the acceptance; and that, before the order was drawn, the defendant had said he would accept the draft in favour of the plaintiff, when spoken to concerning it.

BAY, J. observed to the jury, that as this order was drawn on, and accepted by, the defendant, six years after he had every information respecting the funds whereby to take it up, he should not now be allowed to take advantage of it, and say he had no funds, especially as it was his duty, as

sheriff, to resell the lands, if the first purchase-money was not paid, and raise the money out of it.

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Verdict for plaintiff.

*Hunt* then gave notice of a motion for a new trial, on the ground of misdirection in the judge, but afterwards relinquished it.

BOONE & Wife against SINKLER, Executor of DURAND.

THIS case came before the court upon a special verdict, which stated "that *John Boone* devised 4,000*l.* to his niece, "*Mary White*, to be paid to her one year after her marriage; and, in the mean time, to remain in his executors' hands, they paying interest for the same. That *Levi Durand*, the defendant's testator, who was one of the executors of *John Boone*, paid *Miss White* her legacy, in 1779, which she received when money was greatly depreciated. That *Thomas Boone*, the present plaintiff, afterwards intermarried with *Miss White*;" and the question submitted to the court was, whether the loss sustained by the depreciation of the money, should be sustained by the plaintiffs or the estate of *Durand*, who had paid it before it was, by *John Boone's* will, payable?

A devise to a niece, of 4,000*l.* to be paid to her one year after her marriage, and in the mean time to remain in the executor's hands, he paying interest for the same, is not a marriage portion, but a vested legacy. Therefore, a payment made to such legatee by the executor, on her arriving at full age, is good, notwithstanding it is not a year after marriage.

*Pinckney*, on behalf of the plaintiffs, contended, that this 4,000*l.* was intended as a marriage portion; every thing, therefore, which tended to lessen or reduce it, was in derogation of the rights of marriage. The money was not to be paid till a year after marriage. It contemplated an event of that kind, and probably might have been intended for provision of a family. Any payment, therefore, before the event occurred, was void, and tended to defeat the inten-

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tion of the testator. That it was the duty of an executor to carry the intention of his testator into execution, and not to defeat it. To shew that it was in derogation of the rights of marriage, the counsel cited several authorities, particularly 1 *Eq. Ca. Abr.* 300. where it is laid down, that payment to a father was *quasi* no payment. That payment to a *feme covert* is not good—the husband will recover it over again. 1 *Vern.* 261. That if a woman, privately, before marriage, releases a bond for 1,000*l.* without consideration, and then marry, the payment is not good, and the husband will recover the bond. 2 *P. Wms.* 360. 1 *Eq. Ca. Abr.* to the same point, being in derogation of the rights of marriage ; also, 2 *Vern.* 17. The counsel further contended, that the conduct of *Durand* had a very suspicious aspect ; he was a residuary legatee of the testator, and trustee of the young lady ; it was his duty to have protected her rights, but, instead of that, he paid her off in trash of paper-money, which was of little or no value. This, he said, was that kind of conduct which did not deserve the countenance of this court.

*Pringle*, contra, admitted that if the sum had been intended as a marriage portion, and the payment had been made to defraud the intended husband, the doctrine laid down by the plaintiffs' counsel, and the authorities in support of it, might have applied. But this was *not a marriage portion* ; it was only a *legacy*. Nothing could be a marriage portion but what *is left by a father*. No marriage portion could be given by a *collateral relation*. All the arguments of the plaintiffs' counsel, were founded on an idea that this payment was made in derogation of the rights of marriage ; and that too, with an immediate idea of defeating the intended rights of the husband ; whereas, nothing of that kind was stated in the verdict, or submitted to the court, and of course they could not presume it. That instead of a marriage portion, it was a vested legacy, which did not depend on marriage as a precedent condition. The year after marriage was only directed as the time when it was payable. Its being payable with interest, made it a vested legacy ; and

to this point he cited 2 *Eq. Ca. Abr.* 540. 542. where it is settled, that if a legacy be devised to be payable at twenty-one, it will go to his executor. But if it was given upon his arriving at the age of twenty-one years, here it would be a *lapsed* legacy, unless it was payable with interest, then it would be a *vested* legacy. 2 *Com.* 270. to the same point. A. devised 500*l.* to be paid at twenty-five years of age, and in the mean time, interest; this was deemed a *vested* legacy. 2 *Vern.* 508.

After having cited these authorities in support of the position laid down that this was a vested legacy, and not a marriage portion—he next contended, that being a vested legacy, it was transferable; and if so, might be released, although the time of payment was not arrived, if she was of full age. *Ambler*, 750. 2 *Vern.* 181. It was next asked, whether, in case *Durand* did not choose to pay interest for money, there was any law to oblige him to pay it? He supposed there was none. Then, if the person to whom it was payable, chose to receive it, he again asked if there was any law to prevent it? He supposed not. But admitting that it depended upon a contingency, yet even in that case, a release of such contingency, would be good. 2 *Eq. Ca. Abr.* 89. A possibility is releasable. Upon this ground, a devise of 3,500*l.* at twenty-one years of age, or marriage, was held transferable, *Talb.* 117. and if so, releasable. A dying before the contingency, yet it is transmissible, if not intended to defeat a precedent condition. 2 *Atk.* 621. 2 *Eq. Ca. Abr.* 89.

*Rutledge*, in reply, argued, that it was very evident that this sum of money was intended by the testator as a marriage portion. That blood is a good consideration to raise uses; and being a sister's daughter, she might have come in under the statute of distributions, if there had been no will. This ought to be considered as a marriage settlement, payable one year after marriage; and if so, then it was a breach of trust in the executor, who in this respect, might be considered as a trustee, to pay the money before the marriage had taken place. It was a contingent interest, which she

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had no right to release, as it was depriving the husband of an interest which he was entitled to one year after marriage.

*The Court* (present, the CHIEF JUSTICE, and GRIMKE, WATIES, and BAY, Judges) were unanimous that the payment was good, and barred the recovery in this case. That this was a *vested legacy*, and not a marriage portion. That being a vested right, she had a power to receive it any time after she came of age; though she could not compel the executor to pay it, if he did not think proper so to do. That it might be compared to receiving money on a bond, before it was due; in which case, although the party could not demand or compel payment, yet if the obligee chose to receive, and the obligor to pay, it was good, and should be binding on both parties.



Orangeburgh  
District,  
Nov. Sessions.

### The STATE *against* HOPKINS.

THE indictment in this case, contained two counts: 1st. For forging a ten pound bill. 2dly. For passing it, knowing it to have been forged.

The prisoner was convicted on the second count; and on the last day of the court, when brought up for sentence,

*Holmes*, as counsel for him, mentioned, that he proposed to move for a new trial at the adjourned court at *Columbia*, and then moved that the prisoner should be taken there by the sheriff of *Orangeburgh* district, in order to be present at the arguments in his behalf, and further to wait the final opinion of the court, agreeable to the directions of the constitution; which

BAY, J. ordered accordingly.



*Adjourned Court, at Columbia, 1st of December, 1794.*

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Hopkins.

Present, RUTLEDGE, Ch. J. BURKE and BAY, Judges.

The prisoner was now brought into court, when

*Holmes*, conformably to the notice he had given, moved for a new trial, on the ground of gross misbehaviour on the part of the foreman of the jury who had convicted him. To prove this he produced the affidavit of a certain *Harry Thompson*, who swore, that on the morning of the day of trial, he had a conversation with the foreman, about the prisoner; in which he declared, *that he had come from home to hang every damned counterfeiting rascal, and that he was determined to hang Hopkins at all events*, or words to that effect. This, the counsel contended, was such an improper piece of conduct on the part of the foreman, as was sufficient to vitiate any verdict, much more so, where the life of a citizen was concerned. In support of this doctrine, he relied on 2 *Morgan*, 25. where a new trial was granted, upon an affidavit that the foreman had declared that the plaintiff should never have a verdict, whatever witnesses he produced. Also, on *Salk*. 645. where the same point was ruled.

*Pringle*, also in support of the motion, urged, that the declaration of the foreman before the trial, if it had been known, would have been a good cause of challenge, even after twenty peremptory challenges; and if so, was a good ground for a new trial, after verdict. 5 *Bac.* 250. Because the law requires they should be *omni exceptione majores*—not liable to an objection on account of malice, ill-will, hatred, revenge, or the like. If they are under the influence of any of these passions, they are certainly improper jurors to try a citizen for his life. In *Co. Litt.* 155. it is laid down, that express malice was a good ground of challenge. Here the counsel said, the malice was express; because the jurymen had declared that he was *determined to hang the prisoner at all events*. No words could possibly

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express a greater degree of malice and ill-will against an unfortunate man, whose life was about to be committed to a jury of his country, than those made use of by the foreman; and that too, before he had heard the evidence, or could possibly form any idea whether he was innocent or guilty of the offence laid to his charge.

*Lee, solicitor*, opposed the motion, on the ground that *Thompson*, who had made the affidavit in this case, was a man of a notorious bad character, a bill of indictment having been found against him for horse-stealing; so that he was not worthy of credit in a court of justice. The *solicitor* then opposed it on the further ground of its opening a door for setting aside every verdict which may be given in the different districts throughout the state; as, he said, nothing was more easy than to procure unprincipled men to impeach the conduct of jurors, after trial, when they were not present to defend themselves; and were at so great a distance from the adjourned court, that they could not be called upon to answer such charges, before the rising of the court. This would, in every case, create a delay of six months, even if the verdict should not be set aside eventually; and in the mean time, the persons making such affidavits, might get out of the reach of justice before the ensuing court, when the matter might be cleared up, by the examination of such juror or jurors, on oath, and thereby elude prosecution for perjury.

The prisoner's counsel, in reply, said, it was not the province of the court to judge of the credibility of the witness; they were bound to take it for granted, that what is sworn to upon the face of the affidavit is true. And that it by no means followed, that because a man was accused of a crime, he was to be deemed guilty of it: on the contrary, the law presumed every man innocent, until his guilt was stamped by conviction.

*The Court*, after hearing the arguments, were of opinion, that the matter of fact set forth in the affidavit, if true, was a good ground for a new trial; and it would be difficult to

say it was not so, even if the character of the witness was of a suspicious nature. At all events, it was a doubtful point ; in which case, it was the duty of the court to lean on the merciful side, and give the prisoner another chance for a fair trial.

A new trial was accordingly ordered, and the prisoner remanded to *Orangeburgh* gaol. He was again tried at the ensuing spring sessions, and acquitted.

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ANDERSON against GILBERT.

TRESPASS to try titles to 200 acres of land in *Newbury* county.

The plaintiff in this case, claimed under a *North-Carolina* grant, dated the 25th of *March*, 1755, to one *John Clark*. On the 1st of *October*, 1755, *Clark* conveyed to *Abraham Anderson*, whose eldest son and heir at law, *Abel Anderson*, conveyed to the plaintiff.

*Shaw*, for the plaintiff, produced a copy of the grant, which was admitted. He next produced a copy of the deed from *Clark* to *Abraham Anderson*, certified from the register's office in *Charleston*; which was objected to by

*Ramsay* and *Colcock*, counsel for the defendant, as no evidence had been offered to prove the loss of the original. But this objection was overruled, under the authority of the act making office copies from the secretary's office, duly proved, and recorded, and attested, as good evidence as the originals. *Trott's Collection*, 559. *Pub. Laws*, 129.

Several witnesses were then called, who proved that *Abel Anderson* was the eldest son and heir at law of *Abraham Anderson*, to whom *Clark* conveyed. Here the plaintiff rested his case.

Ninety-six  
District,  
Nov. Court.

An uninterrupted possession and occupation of land for five years previous to *January*, 1775, is a good title against a grant. No claim to be admitted but a suit at law.

A certified copy of a deed duly recorded, is as good evidence as the original.

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*Colcock* then stated to the court, that the defendant intended to rely entirely on possession, as he had no deeds to produce; but would prove an uninterrupted possession since the year 1766, to that day.

This was objected to by *Shaw*, on the other side, who contended, that a bare *naked possession*, without proof of payment of some consideration, or *colour of title*, would not, under the limitation act, give a title. But this,

BAY, J. also overruled, as it had always been held, that wherever a party intended to rely on possession for title, it was unnecessary either to prove payment of a consideration, or other colour of a title; because it *was occupancy alone* that the law regarded, as a sufficient title in such cases.

The defendant then called sundry witnesses, who proved a possession on the part of himself, and his father, *Jonathan Gilbert*, (who conveyed to him,) from the year 1766, to that period; during all which time, his father and himself had resided on it, cleared a considerable part of it, and exercised every other kind of ownership over the whole tract, which proprietors generally exercise over their lands.

The plaintiff, in order to rebut the evidence of possession given by the defendant, offered to call witnesses to prove, that *Abraham Anderson* went with his deeds and shewed them to old *Jonathan Gilbert*, who was then living on the land, and actually shewed them to him *in presence of a witness*, and ordered him off the land; but that *Gilbert* remained on it by force, and kept it in a forcible manner from that time; and, therefore, it was urged, that it would be unjust to suffer a man to take advantage of his own wrong.

Here again, however, BAY, J. overruled this kind of testimony, as improper. That if *Anderson's* claim was a good one, he ought to have brought his suit at law, and ejected *Gilbert*: for that the law recognised no other kind of claim than by an action at law. That this would appear obvious by a short view of the act of limitation, passed in 1712.

1. That the first clause of the act was *retrospective*, and confirmed the titles of all those who had been seven years in quiet possession, before the passing the act.

2. That the second clause was *prospective*, and allows all persons, five years after the right accrues, to prosecute *their claims to lands*; and bars them for ever afterwards, if they do not, (except infants, and *feme coverts*, &c.)

3. The third clause prescribes expressly, that this claim shall be *by action at law*, and not otherwise.

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The jury found a verdict for the defendant.

*Shaw* then gave notice of a motion for a new trial, but he never brought it forward.



The STATE *against* DUESTOE, for Murder.

THE prisoner in this case, was convicted at the last *Orangeburgh* court of sessions, before GRIMKE, J, of murder. And upon a motion made by his counsel, in arrest of judgment, was, agreeable to the terms of the constitution, brought up to the adjourned court at *Columbia*, before GRIMKE, WATIES, and BAY, Justices.

It appeared upon the inspection of the bill of indictment on which the prisoner had been convicted, that he was indicted by his true name *Anthony Duestoe*, together with his mother, *Mrs. Touchstone*, for the murder of his step-father, *Anthony Touchstone*; and that the grand jury, on the back of the bill, found or made two indorsements, viz. "*The State v. Mary Touchstone, no bill*;" "*The State v. Anthony Duestoe, a true bill*;" which was signed by the foreman in the usual form, omitting the letter "e" in the prisoner's surname, in their indorsement of the title of the

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cause against the prisoner, on the back of the bill. For this omission, (or *misnomer*, as it was termed,)

*Holmes* moved in arrest of judgment. The principal ground on which he argued and relied, was, that this indictment could not be pleaded in bar to another prosecution, in case of acquittal, and therefore was not sufficiently certain against the prisoner so as to affect his life.

*The Court*, (present, GRIMKE, WATIES, and BAY, Justices,) however, after hearing the counsel fully in support of the motion, and the *solicitor* in reply, unanimously overruled the motion; because the prisoner's true name was properly inserted in the body of the bill of indictment, viz. "*Duestoe*." By that surname he was arraigned; he pleaded to it by the name, and was finally convicted of the offence by it; and that it was too late, after conviction, to come in and take advantage of it. That the law allows every prisoner accused of a capital offence, a copy of his indictment, three days previous to his trial, for the express purpose that he might know how to plead to it. If, therefore, there had been any matter of substance, either in the bill or finding of the jury on the back of it, he ought to have pleaded it *on his arraignment*; or, on being brought up for trial, *to have refused to answer it*, or *to hold up his hand at the bar*. As, however, he did neither, he admitted himself to have been the *person indicted*; and also the person *against whom the bill was found* by the grand jury, which was afterwards identified by the witnesses on the trial. With regard to this indictment not being pleadable in bar to another prosecution for the same offence, in case of acquittal, the court were of opinion, that the name and offence were so clearly set forth in the body of the bill, that there could be no question about it. And as to the finding of the jury on the back of it, it was so evidently against him as to be beyond all doubt; so much so, that no person could possibly suppose that the bill was found against any other man but the prisoner. *Fest. 79. Lord Pittsliigo's case.*

The omission of a letter in the title of a bill found by a grand jury, not a good ground of motion in arrest of judgment; as the prisoner has pleaded to it, and convicted on it; especially where the name is properly stated in the body of the bill of indictment itself.

The motion in arrest of judgment being overruled, the next day,

*Deas*, for the prisoner, now moved for a new trial, and grounded his motion on the affidavit of *Mary Merriman*, which stated, "that on the day after the trial of the prisoner, in a conversation with *Allen Howard*, one of the jurors who sat upon the trial of the prisoner, he declared to her, that the jury *did not go by the evidence*, but were *determined to hang Duestoe, right or wrong*;" and rested on *Hopkins's* case, where a new trial had been granted, he said, on a similar affidavit, to wit, that of one *Henry Thompson*, who deposed, "that on the morning of the day before *Hopkins* was tried, in a conversation which he, *Thompson*, had with *Mr. Ott*, who was afterwards foreman of the petit jury who tried *Hopkins*, he heard the said *Ott* say, that *Hopkins* was a *counterfeiting rascal*, or words to that effect; and that he, *Ott*, was summoned on his trial as a juror, and that he was determined to hang him, at all events." The counsel then contended, that the credibility of a person making an affidavit of this kind, was not a matter for the consideration of the judges, on a motion of this nature, but that they were bound to give credit to such affidavits, unless contradicted by other affidavits, and that this point had been so ruled in *Hopkins's* case.

*BAY, J.* who sat on the trial of *Hopkins*, and who was present when the motion for the new trial was made, said he remembered that this point was much pressed on the court by *Hopkins's* counsel, on the motion for a new trial; and the more especially, as it was suggested, in the course of the argument, that *Thompson*, who had made the affidavit in that case, was a man of a very bad character; which point was not then contradicted by the court, (being a new one,) but admitted. Though his mind, upon mature reflection since, was by no means satisfied with the admission of the doctrine then insisted on by the counsel for *Hopkins*. For it was easy to see that if the Court were precluded from examining into, and judging of the credibility of the

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persons making these kind of affidavits, or directing further inquiries or examinations on the subject, it would be cutting up the justice of the country by the roots, though the ground on which the court ordered a new trial was a legal one; for if the affidavit of *Thompson* was true, it turned upon the declaration of the foreman of the jury, *previous to the trial*, which was good cause for granting a new trial. In *Salk. 645.* a new trial was granted upon an affidavit that the foreman declared before the trial that the plaintiff never should have a verdict, whatever witnesses he produced. 2 *Mor. 29. Co. Litt. 158.*

The credibility of witnesses making affidavits to ground motions for new trials, or in arrest of judgment, &c. must be taken into consideration by the court, *ex necessitate rei.*

Whenever the conduct of a juror is to be impeached as the ground of motion for a new trial, a copy of the affidavits, on which the motion is to be grounded, ought to be served on such juror a reasonable time previous, in order that he may have an opportunity of exculpating himself, on oath; otherwise such affidavit ought not to be read.

*The Court*, therefore, at this stage of the cause, took an opportunity of giving their sentiments *seriatim* on this point, and were all of opinion, substantially, that the doctrine on the former occasion, in *Hopkins's* case, and now again insisted on, by which it was contended, that *the court was precluded from judging of the truth of these affidavits*, or of the *credibility of the persons making them*, and that they ought to be admitted as a *matter of course*, would be a most dangerous and mischievous doctrine to the community, and ought to be rejected. For that it was the duty of the judges to judge, from the necessity of the case, not only of the credibility of the witnesses brought forward in this manner, to destroy the verdict of twelve men upon their oath, but to inquire into and sift such affidavits with an exact and scrupulous attention; and to direct any other examinations which could in any manner develope the truth of the matter; as no other body of men could, at this stage of proceedings, take it under consideration but the judges. The court were further of opinion, that no such affidavits, calling in question the verdict of a jury, should in future be received, unless copies of them should be previously served on such juror or jurors whose conduct may be called in question, and a reasonable time allowed to answer them.\* And that

\* Vide, 2 *Morgan*, 25. where it is laid down, that if jurymen refuse to clear themselves on oath, a new trial will be granted; which shews the propriety of serving them with copies of these affidavits.



the requiring such notice would tend to check applications of this sort, which were not well founded ; and the case of *Hopkins* shewed very strikingly the necessity of laying down this rule.

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*The Court* then directed the further examination of *Mary Merriman*, on oath, *viva voce*, in court, touching the time, place, manner and circumstances of the conversation sworn to, and the declarations of *Howard*, and who were present, &c. when it appeared that there were such manifest inconsistencies, both in her affidavit and what was further deposed by her at the bar, that the court could not think themselves justifiable in ordering a new trial ; because, if the matters contained in the affidavit itself, and what she further swore to, were true—it could only amount to loose conversation, or discourse of a jurymen after verdict, not on oath, which shall never be allowed, in law, to set aside a verdict solemnly delivered in on oath, in court, to which every individual juror has given his assent. 1 *Durn. & East*, 11. 2 *Ibid.* 282. 2 *Black. Rep.* 1300. In the case of *Hopkins*, so much relied on, the conversation there sworn to was alleged to have been before trial, and came within the rule in 1 *Salk.* 645. which, if true, evinced an unpardonable degree of partiality and malice, in prejudging a case, so as to affect the life of a citizen, before he had heard the evidence. It was such an improper bias as struck at his capacity at once, as a juror ; whereas, in the present case, the conversation sworn to, was a day after the trial, contrary to what the juror himself had assented to on oath, in court, and particularly went to falsify matters of fact which were rendered certain by the judge's notes of what the witnesses proved on the trial. That this affidavit had, upon the very face of it, the appearance of contrivance, or the juror himself must have said what was not true ; as he is made to say, that the jury went contrary to, or did not go by, the evidence ; whereas it appears, from the judge's report who tried the cause, that the verdict was well warranted by the evidence given on the trial. It was therefore evident, upon the whole, that what

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this juror is made to say, in this affidavit, was at variance both with the verdict delivered in, and also with what was proved by the witnesses on the trial ; for which reason the court were of opinion that a new trial ought not to be granted.

GRIMKE, J. then pronounced sentence of death on the prisoner, and ordered him for execution on the tenth of *December* following, at *Orangeburgh* ; but previous to that day,

The prisoner broke gaol and escaped.

N. B. The report of this case has been perused by the CHIEF JUSTICE, and BURKE, J. who have concurred with the other judges, in the law and principles laid down at *Columbia*, on this occasion.

The prisoner was retaken after the above escape, and after identifying his person at a future court, was again ordered for execution and suffered.

May Term.

ZYLSTRA against The CORPORATION of CHARLESTON.

Where the city council of *Charleston* pass a by-law imposing a fine of 100*l.* sterling for an offence against the police of the city, and the court of wardens proceed to recover it. The and because cognised by will lay to

THE plaintiff, *Zylstra*, was convicted under one of the ordinances of the city-council, for keeping a tallow-chandler's shop, within the bounds of the city, and fined for the offence, in the sum of 100*l.*

The present therefore, was a motion for a *prohibition*, to restrain the court of wardens from levying this fine, as unconstitutional and out of its jurisdiction.

proceedings are *coram non judice* and void, being above their jurisdiction ; also their proceedings are not by jury agreeable to the *lex terræ*, and *magna charta* and our state constitution. For these reasons a *prohibition* to restrain all their proceedings.

It appeared that the proceedings against *Zylstra* in the wardens' court, was by way of information,

*Peace*, in support of the motion took three grounds :

1. That the proceedings by way of information, was taken away by the new constitution of the state.

2. That if it was not, still it must be agreeable to the common law.

3. That the penalty being above 20*l.* sterling, it was not recoverable in this inferior court of wardens, without the intervention of a jury.


1. 2. He urged, that all public prosecutions by way of information, which had always been considered in *England* as an arbitrary mode of proceeding, was abolished in this state by the second section of the third article of the new constitution ; and that every such prosecution must, since the adoption of that constitution, be carried on through the medium of a grand jury, by way of indictment, and not left to the arbitrary discretion of a court—not even the superior courts, much less to an inferior one, which had not a jury attached to it. Upon this ground, he said, the proceedings were erroneous, and ought to be set aside. But what he principally relied on, was his

Third ground—which was, that the penalty being above 20*l.* it was not recoverable in the court of wardens, in a summary way, without a jury. He admitted that the charter enabled the city council to make *by-laws* for the good government of the city ; provided they were not repugnant to the law of the land ; and to annex *and levy fines* for all offences committed against their by-laws ; and to *recover* all penalties which may be incurred under any law or laws then in force, respecting the said city. And also, that the act for enlarging the powers of the corporation, passed in *March*, 1784, gave them cognisance of debts not exceeding 20*l.* But he contended at the same time, that the court of wardens could possibly take cognisance of any thing above 20*l.* That the penalty in question, exceeded this sum, and therefore could not, by any possible construction, be within the limits of their jurisdiction. That a cor-

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1 Bac. 449.  
Ibid. 504, 5, 6.

Vin. 497.  
4 Inst. 200.  
2 P. Wms.  
209.  
Holt, 186.  
Salk. 202.

poration has no natural rights; it is an artificial body, created by its charter, which prescribes bounds and limits to it, beyond which it cannot pass. That a corporation has many incidents given to it by charter—such as suing and being sued, having a common and perpetual succession, and that of making by-laws, &c. But at the same time, one uniform rule governs all corporations, viz. *that nothing shall be intended to be within their jurisdiction but what is expressly given*. Whenever therefore, they take cognisance of a thing they have no right to do, then their proceedings are *coram non judice*, and void. That this was exactly what had been done in the present case. The city council had passed a by-law, inflicting the penalty of 100*l.* and the court of wardens had proceeded to take cognisance to the amount of 100*l.* to convict the offender for it, and had issued an execution for levying the same, although their powers are expressly limited to 20*l.* This therefore, he said, was taking cognisance of what they were not authorised to do; consequently, under the foregoing authorities, their proceedings were *coram non judice*, and void. Besides, the greatest of all evils which such a claim of power was likely to draw after it, was, that it had a tendency to deprive a citizen of the inestimable trial by jury, the birthright of every citizen, secured to him by *magna charta* and our excellent constitution. He therefore prayed that a prohibition might issue, to restrain the court of wardens from exercising so unwarrantable a stretch of power as they now claimed in this case.

*Peyton*, contra, denied that the powers of the city council were limited or confined by the charter. That they were left undefined and discretionary, according to the extent of the evil the ordinance was intended to prevent. And that if it had been the intention of the legislature to confine the powers of the city council in this respect, it certainly would have fixed some sum, beyond which they could not extend their fines and penalties. Their silence therefore on this head, carried with it conclusive proof that it was the idea of the legislature to leave this matter to the sound sense and

discretion of the body of men, who should, from time to time, compose the city council. If therefore, the city council had this power, by the corporation charter, to fix any sum it thought reasonable and proper, it must follow as a necessary incident, that the court of wardens could recover it. For it would be a solecism in the doctrine of corporations, to suppose it could impose a fine or forfeiture, which it could not recover: besides the city charter gives the power of levying all such fines and penalties as should be so fixed by their by-laws.


*Marshall, city recorder*, urged that the by-laws under which the offender had been convicted, was made to prevent nuisances. That in a large populous city, in a warm climate like ours, such laws were peculiarly necessary, to preserve the health of the citizens. That it was a law which came in aid of the common law, which required a prompt and easy remedy to carry it into execution. That the necessity of the remedy, and the usual delay in the ordinary course of justice, would not admit of pursuing the usual forms of proceedings for misdemeanors in the common law courts. That no one could say the fine was disproportioned to the nature of the offence; and if the offence was committed, no one could say that the penalty should not immediately overtake it, so as to prevent, if possible, a repetition of it. He acknowledged that the charter was silent as to the amount of the fines the city council was authorised to inflict for the breach of their by-laws; but this, he said, must ever depend upon the enormity of the offence, and an urgent necessity for an immediate check. And therefore, he said, it was left indefinite, to be governed by imperious circumstances, and the sound discretion of the city council. That the act for enlarging the powers of the corporation, it was true, had circumscribed the jurisdiction of the court of wardens, in cases where citizen and citizen were concerned against each other, and sought for redress in that court, to 20*l*. but in cases where the corporation itself was concerned, or where the inhabit-

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ants of the city were interested, it was silent also. And the jurisdiction of that court, in these particular cases, must be coextensive with the powers of the city council to impose the penalties ; otherwise, this absurdity must follow, that the city council had a power to inflict a fine, which the city court or jurisdiction could not reach or recover.

*Pinckney* concluded on behalf of the corporation. That the prevention of nuisances was a matter of domestic regulation in the city, and expressly came within the letter, as well as the spirit of the charter. A tallow chandler's shop, he said, was a nuisance at common law, in a city. There was an old law in force in this state against it, which inflicted the same penalty on the offence which the city council had done by the ordinance under consideration : so that, in fact, it was doing neither more nor less than re-enacting the old law within the bounds of the city. The charter with respect to fines, is indefinite, and having so good a precedent before them as the former act of the legislature for preventing the same offence, the city council was highly justifiable in making this ordinance, which is neither repugnant to the common law of the land, nor the former act of the legislature of the country, on this subject ; but, on the contrary, it has come very properly in aid of them both, within the bounds and limits of the city. The civil jurisdiction of the city was originally confined to small and mean causes, 3*l*. but in the act of 1784, it was extended to 20*l*.—the same jurisdiction which the judges of the court of common pleas have, without the intervention of a jury. This, however, was intended to be confined to cases between citizen and citizen, who came into the wardens' court of justice. It certainly never was intended to disarm the corporation from defending the city against nuisances, or other offences or dangers, which required a prompt and efficacious remedy to prevent them. The power, therefore, of levying and recovering those fines, must be co-extensive with the power of enacting them, otherwise the ordinance itself must become a dead letter. That by the terms of the charter itself, all the ordinances of city coun-

cil are repealable by the act of the legislature. This seems to be the only check provided by the charter, for repealing or setting aside improper or illegal ordinances—the power is not given to the courts of law. Several legislatures have sat since the passing of this ordinance in 1784, and they have never thought proper to call the propriety or legality of it in question. The presumption therefore is, that it fully met with their approbation.

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BURKE, J. The plaintiff was prosecuted and fined by the court of wardens in the penalty of 100% for infringing a by-law, passed by the city council, and which subjected to the forfeiture of that sum, any one convicted of making soap or candles contrary to the mode prescribed by that by-law. He has applied for a prohibition upon this ground chiefly, that that court not having jurisdiction under its charter, for the recovery of that amount, hath exceeded its authority, and that of course, the whole proceedings are void. To give this case a full consideration, I think it necessary to inquire, 1st. If the corporation possesses the legislative power they have exercised—that of *enacting laws* and creating penalties to 100% or any greater amount that they may choose? 2dly. If they have a judiciary power for *recovering* these fines? 3dly. If they have also the *executive* power of *levying* them? 1st. It is to be observed, that the power which they have set up, hath no bounds or frontier that they shew to us. It is sovereign and unlimited, by their claiming authority (under the precedent of laying 100%) to inflict as far as 500% of consequence to 1,000% or any greater sum, as they may think proper. This is a pretension so extravagant, that it seems to me to be paying a very sorry compliment to law and common sense, to dwell upon arguments to the contrary. The claiming of such authority, by a body too of very inferior jurisdiction, not equal perhaps to our county courts, and publicly supporting this claim as they do, shews clearly, that our laws, and the decision of our courts are in a state of uncertainty that men of sense and reflection

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very little think of. Upon the slender basis of the confined authority which the corporation really possesses, to erect such a high superstructure, and insist publicly on their right to do so, proves another thing—it serves to illustrate upon a small scale, the intruding, usurping nature of power ; and with how much greater than the energy of a wedge, it is eternally at work to force open for itself, more elbow-room and free license, than foresight itself or reason ever intended. The ground of this mighty claim to legislate and recover high penalties, to bind the person and property of a citizen without a trial by his peers, is the original charter of 1783, which extended their authority *to that of a justice of the peace, and no more*. In 1784, they applied to the legislature for an augmentation of power ; they obtained that of imprisoning for non-payment of fines, and a jurisdiction to the court of wardens coextensive in one instance with that which the court of common pleas possesses, viz. that of deciding causes as far as 20*l*. without the intervention of a jury ; except where the title of land may come in question. In this, and in all cases beyond 20*l*. the court of wardens are completely shut out from intermeddling, in as express language as could be made use of.

Thus, therefore, the by-law under which *Zylstra* was prosecuted, was utterly void ; for the corporation was not vested with competent legislative authority ; and they had as little judiciary power to try a cause and give judgment for 100*l*. as they held as legislators : therefore, for the court of wardens to hear and determine such a cause, without the intervention of a jury, was what no court in the state durst presume ; it being repugnant to the genius and spirit of our laws, all of which recognise jury trial, which is also guarantied to us expressly by our constitution. The conviction, therefore, of *Zylstra* being nugatory, the execution or further proceeding ought, in my opinion, to be stayed.

GRIMKE, J. of opinion that a prohibition should go, as there were no express words in the act of incorporation,



or in any other act of assembly, giving power to the court of wardens to hear and determine on a case of this amount.

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WATIES, J. In the light in which I view this case, the question to be decided is of much importance to the citizens of the state, and involves the *general* jurisdiction of the court of wardens. For however the decision may appear to affect that court in a single instance only ; yet, if in this its jurisdiction is defective, it will be difficult to shew that any part of it is not so, beyond what may be exercised by justices of the peace.

I am willing to admit that the by-law itself is a valid one. If it restrained the exercise of an inoffensive trade, it would not be so ; but it is made to restrain one that is both offensive and dangerous. It is, therefore, calculated to guard the comfort and safety of the citizens ; and the benefit of a by-law, is generally the touchstone of its validity. I am not, indeed, fully satisfied that the city council have the power to impose penalties to *any amount* ; but I shall not now make it a question, as my decision in this case will be on other grounds. 1 Bac. 505.

The only question I shall consider is, whether the court of wardens can hold plea of a suit for the recovery of this penalty ? I am of opinion that it cannot, and this opinion is founded on the following reasons—1st. Because the power claimed is not granted by any express words of any general law. 2dly. Because, if it is expressly granted ; yet it is void, as being repugnant to the constitution of the state.

1. In every question on any corporate right, and in every question on the jurisdiction of an inferior court, the right should be manifest. If it is involved in any doubt, this circumstance alone is a strong legal objection to it. The authorities in support of this position are numerous and explicit ; it is not, therefore, necessary to recite them all, a few will suffice. 1 Bac. 504.  
2 P. Wms. 209.  
and many more.

The counsel for the court of wardens have indeed offered strong and forcible reasons for implying the power claim-

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ed by that court. It is urged, that the law for incorporating *Charleston*, gives a power to the city council to affix and levy fines, without any limitation of their amount ; that a subsequent law gives to the court of wardens a power to commit for fines and penalties, which necessarily includes the power of previously determining any suits respecting them. For how, otherwise, can that court proceed to commit for fines and penalties, if judgment be not first had therein for them ?

I am sensible of the force of this reasoning, and if it were permitted in any case, that implication might give jurisdiction to an inferior court, I would say it did so in this ; but the law forbids any such construction, and declares that no powers, except such as are generally considered as incidental, shall ever be intended to belong to an inferior court, unless they are expressly given. Now there is no law which *expressly* declares that the court of wardens may hold plea of a case like this, nor is the power incidental ; this court therefore, may safely declare that such a power does not belong to it.

But as possibly this construction may seem too rigid a one, I shall rest my opinion on another ground, which appears to me to be much stronger.

2. Admitting then, that the legislature intended to confer this large jurisdiction on the court of wardens, and that it had declared this intention in words sufficiently explicit ; yet I have no difficulty in saying that the law in this respect is *void*, as being *contrary to the constitution of the state*.

By the second section of the 9th article, it is declared that " No freeman of this state shall be in any manner deprived of his life, liberty, or property, but by the *judgment of his peers*, or by *the law of the land*." And by the sixth section of the same article, it is further declared, that " The *trial by jury*, as heretofore used in this state, shall be for ever *inviolably preserved*."

How then can a law be valid, which constrains a citizen to submit his person and his property, to a tribunal, that

proceeds to give judgment on both, without the intervention of a jury? Does these words of the constitution, "or by the law of the land," authorise it? Do they mean any law which may be passed, directing a different mode of trial? Such a construction would be incompatible with the declaration of this privilege; it would be taking away all the security which that intended to give it; it would do more, it would be making the constitution itself authorise the means of destroying a right which it afterwards declares shall be inviolably preserved. For if the law may abridge the trial by jury, it may also abolish it; and this great privilege would be held only at the will of the legislature.

But when we consider the true import of these words, and allow them the construction which all the commentators upon *magna charta* (from whence they are taken) have concurred in giving them, they will then be found to afford a real security to the citizens for the preservation of this right, and to become an effectual bar to the innovations of the legislature.

I shall not resort to all the writers on this subject; it will be sufficient to quote the exposition given of these words by Dr. Sullivan, whose commentary upon *magna charta*, is perhaps the best that has been written; it is an illustration of Lord Coke's reading upon it, which no English lawyer has ever yet ventured to question.

"The words *the law of the land*, mean the common law  
 "or acts of parliament, down to the time of Edw. II.  
 "which are considered as part of the common law: vide  
 "*Hale's H. C. L.* 7, which does not in all cases require a  
 "trial by peers." It will be sufficient to point out in general  
 the principal cases, where this *lex terræ*, or as Lord Coke  
 calls, *the due process of law*, superseded the trial *per pares*.  
 "First then, if a man accused of a crime pleads guilty, so  
 "that there is no doubt of the fact, it would be an absurd  
 "and useless delay to call on a jury to find what is already  
 "admitted; accordingly, *by the law of the land*, judgment  
 "is given on the confession. So in a civil action, if the

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tion of  
Charleston.2 Coke's Inst.  
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Sull.Lect. 384.

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“defendant confesses the action, or makes default, (in a  
 “suit on a bond,) no jury is requisite. So, if both parties  
 “plead all the matters material in the case, and a demur-  
 “rer is joined, the judges shall try the matter of right de-  
 “pending on the facts admitted, and give judgment *accord-*  
 “*ing to law*, without a jury.” “The inflicting of punish-  
 “ments at the discretion of courts for all contempt of their  
 “authority, is also part of *the law of the land*, being found-  
 “ed in the necessity of enforcing due respect and obe-  
 “dience to the courts of justice, and supporting their dig-  
 “nity.”

Id. 392.

Besides these several kinds of proceedings to judgment, practised by courts of *common law*, without the interven- tion of a jury, and which are authorised under the words *the law of the land*; these words also authorise *other kinds of courts*, on account of their great public expediency, which do not admit this method of trial, and whose proceed- ings are different from those of the common law. These,

Id. 397.

in *England*, are the *court of chancery*, the courts *ecclesias- tical*, *maritime*, and *military*; and certain other inferior

Id. 399.

judicatories, some of which are sanctioned by the common law, others by statutes; of these, however, there are some of modern creation, which may be said to be of doubtful authority, as they seem to be considered even by Judge *Blackstone*, (who had high ideas of the omnipotence of par- liament) as infringements of the prerogative of the subject.

3 Black. Com.  
 82, 380.

The next inquiry is, what are these other kinds of courts which are authorised in this state, by the same words in our constitution?

I answer, the court of equity, the court of admiralty, the courts of ordinary, courts-martial, and courts of jus- tices of the peace. The three first, because they are neces- sary and distinct parts of our juridical system, without which the administration of justice would be incomplete; the common law jurisdictions being incompetent to afford remedies for all the variety of public and private wrongs. Courts-martial, because the trial of offenders against mar- tial law by a jury, would effectually destroy that subordina-

tion which is so necessary to the safety of an army, and is the soul of all military enterprises. The courts of justices of the peace—because they are sanctioned by long use, and it may be said by a popular adoption of them ; because they are necessary for the relief and convenience of the poorer class of citizens, whose circumstances will not admit of a long absence from home, and whose little debts require a speedy recovery, and are of too small an amount to bear the expense and delay attendant on suits in the superior courts. (“ Even injustice is better than procrastination.” 4 *Black.* 442.) And because too, from the frequency of their sittings and the thinness of our society, it would not be practicable ; and even if it were, it would be an insupportable grievance to the citizens to serve as jurors in all of them.

I do not reckon among the number of these authorised exceptions to the trial *per pares*, the equitable jurisdiction of the common pleas : because I do not consider this as excluding that mode of trial. It does indeed, by consent of the parties, proceed to judgment without a jury, but either party may demand one if he pleases. This then, is no proof that the legislature may dispense with this right ; on the contrary, it furnishes a striking and instructive instance of the sense of that body on the sacred nature of it, and is a kind of legislative evidence of its inviolability, which ought to have been remembered. While it committed to the superior court, a power which that court was surely better able to exercise uniformly, and for the benefit of the citizens, than any inferior court ; yet the legislature did not consider itself at liberty to exclude the trial by jury, but expressly recognises the right of either party in a suit, to have a trial by that mode, if he should require it. If this right, however, is waived, the court may lawfully proceed to determine on the case ; for this, *by consent*, even arbitrators might do.


The only extraordinary jurisdictions, then, which, in my judgment, are sanctioned by the *lex terræ*, are those I have enumerated. It cannot have escaped the observation of those who hear me, that I do not include among them the

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Id. 347.

jurisdiction of the court of wardens, *even in cases not exceeding 20l.* I could wish to have avoided taking notice of this part of its jurisdiction, at present ; but in the consideration of the true meaning and effect of these important words in our constitution, on which not only the particular power now claimed, but also every other given to that court, must wholly depend, I am unavoidably led to consider what part of its jurisdiction is authorised by them, in order to shew, with more certainty, what is not so. By the 7th clause of the act of 1783, to incorporate *Charleston*, the court of wardens is established with the same powers as are exercised by the *justices of the peace* ; so far, then, its jurisdiction is legitimate. But by the 7th clause of an act of 1784, to enlarge these powers, it is declared, that “ the court  
 “ of wardens shall and may have, hold, and exercise, the  
 “ same powers and authorities in all cases of debt or da-  
 “ mage, by whatever means sustained, and which do not  
 “ exceed in value 20l. (except where the title to lands may  
 “ come in question,) as the judges of the court of common  
 “ pleas or admiralty have, hold, or do exercise, in their  
 “ respective jurisdictions.”

This clause will admit only of two constructions, either of which is fatal to the jurisdiction therein given. First, it may mean that the power of hearing and determining, in a summary way, without a jury, (which is the power given to the judges of the court of common pleas,) shall be subject (as that is) to the right of either party in a suit, to demand a jury if he chooses. Now, if on the trial of a cause in the court of wardens either party should insist on this right, what is the consequence ? There is no jury already impanelled, nor can the court award a *venire facias* for the purpose ; the proceedings then are arrested, the jurisdiction of the court is rendered impotent, and all the power given by the law becomes a nullity. If, on the other hand, the law intended that the proceedings should be without a jury, (which indeed appears to be the true construction, as there is no reserve of this right, and no provision made for the exercise of it,) then the law is a direct violation of the con-

stitution, and is therefore void. For what pretensions has the court of wardens to the same special sanction allowed to the courts before taken notice of under the words of the constitution? It appears that they were admitted as exceptions to the common law proceeding *per pares*, on account of their being founded *in necessity and great expediency*. But it does not appear that the court of wardens was produced by any of the causes which give legitimacy to them; it does not exercise any power which the established courts are not fully competent to, nor was it necessary and expedient that its *proceedings* should be without a jury. Why, then, dispense with the fundamental right of the citizen?

But it may be said, it is too late now to question the authority of the court of wardens, because it was created before the making of the constitution, and is therefore confirmed by it.

If the constitution was the first acquisition of the rights of the people of this country—if *then*, for the first time, the trial by jury was ordained, and the right then commenced, there would be some ground for this conclusion. But the trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors, in succession, from that period to our own time; having never been departed from, except in the instances before mentioned. This right, then, is as much out of the reach of any law as the property of the citizen; and the legislature has no more authority to take it away, than it has to resume a grant of land which has been held for ages. It is true that the reasons which in *England* make this privilege so valuable, and have produced such enthusiastic eulogies on it, do not all exist here. There, it is considered as a barrier between the rights of the people and the usurpations of the government; here, it can be wanted for no such purpose; the government and the people have the same

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common interests, and the same common views ; yet, there are other reasons sufficient to endear this privilege to us, and give it a rank among the first of those which belong to us as freemen. In a country like ours, so thinly-peopled, where, as in all societies, every man of any consideration has extensive private connexions, and often a secret interest in courting popular favour ; if the power of proceeding to judgment, in all cases, was committed to a permanent body of men, it would sometimes happen that private affection or party views would intermingle in the trial of right, and prevent a fair and impartial decision. But when the rights of the citizens are to be determined on by 12 men, changed at every court, and indiscriminately drawn from every class of their fellow-citizens, there will be a better chance, generally, that the poor will receive an equal measure of justice with the rich, and that the decision of facts will be according to the truth of them.

I have hitherto considered the question as a general one, with respect to the court of wardens ; and if, from the discussion, it appears that the only jurisdiction of that court, which the constitution authorises, is that of *justices of the peace*, originally given to it, and that all that has been super-added is illegitimate and void, it would be superfluous to adduce other grounds of objection to the particular power claimed in this case. For if in civil cases, and within 20*l*. its proceedings are contrary to the constitution, how can it proceed in a penal case, and to the amount of 100*l* ?

There is, however, one other objection which I cannot forbear taking notice of, as it shews a peculiar impropriety in giving to that court a jurisdiction in this case, and is of too serious a concern to the rights of the citizens, to be overlooked. It arises from the nature of the city charter. Any one who will consider this at all, must see in it a most unnatural combination of the legislative, the executive and judicial powers. Heretofore it has been thought essential to civil liberty, to keep these powers widely asunder ; the separation of them was supposed to characterize a free government, and the union of them a despotic one. But, by



virtue of the charter, the city council makes by-laws ; they appoint, as is frequently the case, some of their own members the commissioners to carry them into effect ; and the same members afterwards may take their seats as judges, to determine on any breaches of them which may have been committed. It may sometimes happen, too, that, in the course of their duty as commissioners, they are witnesses to the violation of some by-law ; they may then add one more character to this multiform political monster, and exhibit legislators, executors, prosecutors, witnesses, and judges, all in the same persons.

There surely could not be contrived, by the most ingenious tyrant, a more complete instrument for all the purposes of oppression. I speak, however, of its form and structure only ; for I do not believe that it has yet been employed in doing mischief ; I rather believe that it has been made to do much good. But it has not been harmless because it wanted power to be hurtful ; the citizens are wholly indebted for this to the honour and integrity of the persons who have hitherto composed the corporation. It gives me pleasure to make them this acknowledgment, and I feel a still greater one in reflecting on this curious testimony in favour of a free government, which proves incontestibly, that the happiness and welfare of the society is the interest of *individuals*, since the instruments of evil and mischief are, in the hands of freemen, not only harmless but even convertible sometimes into the means of general good. But this might not always continue, and a trust of this sort is dangerous, even with freemen ; it is right, therefore, to adhere to fundamental principles of security.

I will not lengthen this argument unnecessarily. The reasons already offered are sufficient, in my opinion, to shew that the court of wardens has no authority to proceed in this case, and any other reasons to shew the same thing, would not make it more manifest. Being fully persuaded then, that the power claimed by that court does not belong to it ; that any grant of it by law is contrary to the constitution ; and that it is the peculiar and sacred duty of this

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court to watch over and protect from all violation, the constitutional rights of the people; I do not hesitate to concur with my brethren in ordering a prohibition to issue, &c.

BAY, J. declared himself of the same opinion, and concurred fully with the other judges.

*A prohibition was accordingly directed to be issued.*

The city ordinance in question was afterwards repealed, and no attempt was ever after made to exercise so unwarrantable a jurisdiction.

#### PARKER *against* KENNEDY.\*

Indorsement  
of a bond by  
the obligee in  
*blank* will not  
make him lia-  
ble to a holder  
in case of the  
insolvency of  
the obligor.

THIS case came before the court upon a special verdict, which stated, that in a transaction between the parties some time in the year 1788, the defendant gave the plaintiff a bond, signed *Benjamin Singleton*, payable to himself, the defendant, for 700*l.* sterling; and at the time of passing it, he made a *blank indorsement* on it, by placing his signature or name on the back of the bond. *Singleton* afterwards died insolvent: and the great question submitted in the verdict to the court was, whether the defendant was liable to the plaintiff for the amount of this bond or not.

The declaration contained three counts: 1st. Upon an implied warranty on the part of *Kennedy* to pay this bond, in case of the insolvency of the obligor, with an averment that he, the plaintiff, *Parker*, was the assignee of *Kennedy*, and as such, had a right of action upon this implied undertaking. 2. That the defendant drew a bill of exchange in favour of the plaintiff, or order, on the obligor, and had a

\* This case was argued in 1794, but not finally determined till March, 1795.

right, in case of failure on the part of the obligor, to recover against the defendant, according to the law and custom of merchants. 3. The third count was for *money had and received*.

This being a case of great expectation and consequence to the community, it underwent two solemn arguments. It was stated, and not contradicted, on the one hand, that more money depended upon the determination of this question, than any other which had ever been discussed in *South-Carolina*. That bonds to the amount of several hundred thousand pounds sterling had been passed away from man to man, in a great variety of transactions since the peace of 1783. That in sales and purchases, they had served as a kind of circulating medium, which relieved the distresses of the country exceedingly, at a period when the cash had been drained out of it, or exported to foreign countries. That in these transfers, the usual mode of passing them was by a blank indorsement on the back of the bond, as in the present case. It was further stated and admitted, that in the course of several years, while parties were prohibited from recovering their debts by instalment laws, and other acts throwing impediments in the way of creditors, many of the obligors had gone off and left the state without leaving funds for discharging their obligations; many others died in insolvent circumstances; while others again, had become bankrupts. So that very little more than one half (if so much) had proved good. Under these circumstances, therefore, it was said, it became a question of great magnitude, whether, in cases of the insolvency of such obligors, or their estates, the indorser or persons so passing off such bonds, were liable or not? On the other hand again, it was urged and not denied, that many of these bonds had been negotiated at one-half of their nominal value, or other low rate of depreciation; and in many cases, had become objects of speculation to adventurers. The special verdict, however, did not state that this bond was passed away for less than its real value; and as it did not, the court could not presume it. The case, therefore,

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came forward on the broad basis of law and justice. The arguments on both sides were lengthy and ingenious, and the authorities cited, numerous, on different grounds.

On the part of the defendant, it was generally contended,

1. That a bond was not a negotiable instrument in its nature and effect, and not being so originally, no indorsement could give it negotiability. 2. That an assignee of a bond could only purchase a right to sue and recover the money to his own use. 3. That nothing could be intended by a blank indorsement, which was inconsistent with the nature of the instrument itself; and therefore, as negotiability was not an incident belonging to a bond under seal, such an indorsement could not, by any legal construction, make it negotiable. 4. That this blank indorsement could amount to no more than an authority to fill up a receipt on the back of the bond, or to insert an authority to sue and recover, which were incidental to a bond in the hands of an assignee. 5. That nothing could make the assignor liable, but a special guarantee for that purpose, which was not mentioned in this case; or drawing a bill of exchange on the back of it at the time it was passed, as in the case of *Bay v. Fraser*, *ante*. 1 *Inst.* 232. 12 *Mod.* 554. *Dallas*, 448. 1 *Dom.* 79. *Ld. Raym.* 683.

*The Court*, after the arguments were concluded, took time to consider this case; and as there was a division of sentiments on the bench, the judges delivered their opinions *seriatim*.

The CHIEF JUSTICE and BURKE, J. were of opinion that the defendant was entitled to judgment; and founded their decisions\* on the general grounds contended for on the part of the defendant, that a bond was not a negotiable

\* It is much to be lamented that the learned and able opinions of these judges could not be procured. By some accident or other they have been lost or mislaid.

instrument, and that the intent of the indorsement on the back of it, could only be to enable the holder to sue and receive the money to his own use ; and upon the further ground also, that most of the old bonds passed away at or about the period at which the present bond was transferred, were disposed of to a set of speculators and others who procured them for one-half of their nominal values, and who, on that account, they thought, should run the risk of the responsibility of the obligors.

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GRIMKE, J. The motion at present before the court, is a requisition on the part of the plaintiff, for the court to do a thing which is acknowledged by him to be unprecedented, and for which there has not been, and cannot be, any one instance quoted, or any one authority (which is in point) cited from the law books. Should the court grant this motion, they must annihilate the long supposed distinction between bonds and obligations, and notes or bills of exchange. They must avow that a specialty or deed, can be set over with less formality than the deed or specialty was entered into ; for there is no seal after the defendant's name, who is the assignor in this case. They must declare that assignments and indorsements are synonymous terms, although they have been held distinct from each other for many years past. They must acknowledge every person who puts his name on a bond to be a new drawer of such bond, and liable in the same manner as if it had been a bill of exchange or a promissory note. They must concede that every assignee of a bond may sue in his own name, and they must, if the doctrine of analogy is to be carried to the extent for which the plaintiff contends, deprive every obligor of such equity as he may have against his bond. They must alter the practice of this country in this particular, that an assignee need not sue the obligor to insolvency, before he may bring his action against any persons who may have become security for the payment of such debt. They must agree that it is in their power to

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alter the well known principles of the common law by construction, and to make an individual liable for the payment of a debt, by implication. But as these are powers not within the jurisdiction of this court, we must do as we shall do in the case of *Rippon v. Townsend*; where, although the court have been told what the intention of the legislature was with respect to bonds and notes, yet this court considered themselves as bound down to the technical terms of the law, and to abide by their legal import, though directly contrary to the precise intention of the legislative body. My opinion therefore is, that the line of distinction which has hitherto been drawn between specialties and notes, must be adhered to; that assignments and indorsements are not synonymous; that transferable and negotiable paper are widely different; that the transfer of a deed requires the same solemnities as the execution of it; that we must not make a precedent because there is none, and which would operate as an *ex post facto* effect; that we must not say a blank signature on a paper barely assignable, shall impose a guarantee on the assignor, without any express words to the purpose; nor that it becomes negotiable by such a signature, though contrary to the operation and construction of law, and unsupported by any one single case in the books. I have not, in forming my opinion on this subject, paid the least attention to the arguments, *ab inconvenienti*, nor to those pointing out the facility with which negotiations could be carried on by bonds, should the opinion of the court be in favour of the plaintiff. For it is the business of the legislature to remedy the first; and as to the second, the same facility may be obtained by settlement made with bonds even now, where the parties understand the construction of law on this subject; or by reducing them to notes, which is a much more common method of negotiating business at present, than by bonds. I am decidedly of opinion, therefore, with my brethren who have preceded me, that the verdict should be entered up for the defendant.

WATIES, J. In considering this case, we have very little assistance from *precedents*. The *English* books of reports furnish no cases like it; few that have any resemblance to it. The only similar one is that of *Bay v. Fraser*, tried in this court, and which was determined on *principles*. I should have thought indeed, that that case might have decided this. But although it is admitted to be an authority; yet the applicability of it to this has been denied, and even the points which it must have settled (if it decided any thing) have, in a great measure, been set afloat again. It will be necessary, therefore, to reconsider the principles on which the verdict in that case was founded; for on these, the present one, in my opinion, wholly depends.

The question here submitted to the court is, whether an indorsement *in blank* on a *bond*, makes the indorser liable for the amount to the indorsee, in default of payment by the obligor?

A majority of my brethren have, by the opinions they have delivered, determined that such an indorsement does not make the indorser liable. The question, therefore, must be so decided. But as I have formed a different opinion, it is necessary I should declare it, and my reasons for it; which I will endeavour to do as concisely as the great extent and novelty of the subject will admit of.

There are two lights in which this blank indorsement has been considered.

1st. As making a negotiable contract.

2d. As having the effect only of a common assignment.

In the first of these lights, it has been urged for the defendant, "that this indorsement cannot have a negotiable effect, and cannot, therefore, imply a warranty, because it is made on an instrument that is not negotiable either by custom or by statute; and that the general policy of the law is opposed to it."

It is true, that a bond is not made negotiable by any statute, and that the old law of maintenance is averse to the assignment of any chose in action. It has not, however, been shewn, that a negotiable contract cannot be

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raised by a blank indorsement on an instrument, because it is *not negotiable*.

I think the cases shew the contrary. But admitting this proposition to be true, yet I am of opinion, that there are strong grounds on which a bond may fairly claim as much negotiability as is necessary to make it a fit instrument for that purpose. As this is a point of great novelty and importance, I hope I will not be thought tedious in taking pains to discuss it.

I have examined with a good deal of care, the history of the assignments of choses in action; and I draw from it two conclusions: 1st. That the ancient aversion in the law to these assignments, has entirely given way to the general benefit and convenience arising from them in modern times. 2d. That the *commercial use* of any chose in action, may *alone* give negotiability to it, without the aid of any statute.

It will require but a very short examination to shew the truth of the first of these conclusions. It will only be necessary to shew that the old rule of maintenance has been almost wholly overthrown. Although this rule may have been a reasonable one many ages ago, when there was room to apprehend vexation and oppression, if the right of going to law was assigned; yet, as this danger has long since ceased, (in this country, indeed, it never had an existence,) and as so much of the property of the citizens now lies *in contract*, it would be absurd and unreasonable to suffer it to continue at the present day. I should not be willing, therefore, to give it countenance in this court. I would not, however, be understood to disregard the ancient rules of law; I hope I respect them as I ought; but to revere them when they are no longer of force or useful, would be downright idolatry. It may be a matter of curiosity to look into the decisions which such rules gave birth to; but the search can be productive of little utility or instruction. I hope I shall be excused this remark, when it is considered that the whole of the ancient system of law has undergone material alterations, and received in



every part the most valuable improvements. The quaint and irregular form of the old gothic structure, although the foundation has been preserved, has been so changed and corrected by the more rational skill of modern jurisprudence, that I might venture to say, the judges of the fifteenth century, and even of a still later period, would scarcely be able, if now alive, to recognise it as the same. It is remarkable that the very doctrine relative to this case, I mean the doctrine of paper currency, was even within the present century, imperfect and unsettled ; and it is only within a few years that it has been fully established.

A short review of the history of this branch of law, will justify these observations ; and will shew what little respect the old rule is entitled to, and how much is due to modern principles.

By the common law, according to Lord *Coke*, “ a chose  
 “ in action cannot be assigned or granted over ;” and the  
 reason given is, “ that if this were permitted it would pro-  
 “ mote maintenance, and prove prejudicial to such as,  
 “ though able to contend with those with whom the original  
 “ contract was, might find themselves depressed by a pow-  
 “ erful adversary, if it were assigned.” It will be sufficient  
 to quote the sentiments of Mr. Justice *Buller* on this rule,  
 who has commented on it very fully in the case of *Master v.*  
*Miller*, 4 *Durn. & East*, 340. “ It is laid down,” says he,  
 “ in our old books, that, for avoiding maintenance, a chose  
 “ in action cannot be assigned. The good sense of that rule  
 “ seems, to me, to be very questionable ; and in early as  
 “ well as modern times, it has been so explained away that  
 “ it remains, at most, only an objection to the *form* of the  
 “ action in any case. It is curious to see how the doctrine  
 “ of maintenance has, from time to time, been received in  
 “ *Westminster-Hall*. At one time, not only he who laid  
 “ out money to assist another in his cause, but he that by  
 “ friendship or interest saved him an expense which he  
 “ would otherwise be put to, was held guilty of maintenance.  
 “ Nay, if he officiously gave evidence, it was maintenance ;  
 “ so that he must have had a *subpoena*, or suppress the

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Co. Lit. 214.

1 Bac. 157.

Brn. tit.  
 Maint. 7. 14.  
 17. &c.

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“ truth. Courts of equity, however, from the earliest times,  
 “ thought the doctrine too absurd for them to adopt, and  
 “ therefore they always acted in direct contradiction to it.  
 “ And we shall soon see that courts of law also altered their  
 “ language on the subject, very much. In 13 *Mod.* 554.  
 “ the court speak of an assignment of a bond, as a thing  
 “ which is good between parties, and to which they must  
 “ give their sanction, and act upon. So, an assignment of  
 “ a chose in action has been held a good consideration for a  
 “ promise. It was so in 1 *Roll. Abr.* 29. *Swin.* 212. And,  
 “ lastly, by all the judges of *England*, in *Mouldsdale v. Bir-*  
 “ *chall*, 2 *Black. Rep.* 820. though the debt assigned was  
 “ uncertain. After these cases,” continues Judge *Buller*,  
 “ we may venture to say that the maxim was a bad one,  
 “ and that it proceeded on a foundation which fails. But,  
 “ still, it must be admitted, that though the courts of law  
 “ have gone to the length of taking notice of assignments of  
 “ choses in action, and of acting upon them, yet, in many  
 “ cases, they have adhered to the formal objection, that the  
 “ action shall be brought in the name of the assignor, and  
 “ not in the name of the assignee. I see no use or conve-  
 “ nience in preserving that *shadow* when the *substance* is  
 “ gone ; and that it is merely a shadow is apparent from  
 “ the latter cases, in which the court have taken care that it  
 “ shall never work injustice.” He then proceeds to state  
 these cases in which it appears that the real party, though  
 not named, is as much considered as if he was a party to the  
 action.

By a late act  
of the legisla-  
ture of this  
state, an as-  
signee of a  
bond may  
maintain an  
action in his  
own name.

See 1 Durn.  
& East, 621,  
622. 619.

After this decisive opinion of so enlightened a judge, it  
 will not be thought that I have gone too far in saying that  
 this ancient maxim ought not to have any countenance at  
 the present day. The cases quoted shew how far the *En-*  
*glish* courts have already dispensed with it in the case of  
 bonds. And there is great reason to presume, from the  
 opinion given here by Mr. *Buller*, that he is fully prepared  
 to say, whenever a fit occasion requires it, that even the  
*shadow* of this rule (which is all that remains of it) may be

dispensed with, and that an assignee of a bond may prosecute his right, even in his own name.

I will endeavour, now, to shew the truth of the principal position which I laid down, "that the *commercial use* of any chose in action may *alone* give it negotiability, without the sanction of a statute." I draw the proofs of this from the history of bills of exchange, and of promissory notes. These two kinds of choses in action have long set aside the law of maintenance altogether; and it is an important circumstance, in the history of these, that *neither of them, in their origin, were negotiable*; both, at length, became so, because *the interests of commerce* required it. The first, according to *Montesquieu*, were very early invented; at a time when commerce was confined to a nation covered with infamy. The *Jews*, enriched by their exactions, were pillaged by the tyranny of princes; and being chased by turns from every country, took refuge in *Lombardy*, where they invented this means of eluding violence, and saving their effects. They gave to foreign merchants, and travellers, secret letters on those to whom they had entrusted their effects, which were accepted and faithfully discharged. These letters, then, answered, originally, only a private and special purpose. Being afterwards, however, brought into general use, by the merchants, they received, in the course of time, a fixed form, and were called bills of exchange; and, being found of general convenience to trade, they were, *without the aid of any statute*, allowed to be transferred and assigned over as often as was requisite; sometimes by an indorsement in full, but oftener by an indorsement in blank, both of which equally imply a warranty in the indorser.

Promissory notes are of a much later origin. These have been generally considered as receiving their negotiable quality from the statute of *Anne*; but I think, on a fair inquiry, it will appear that they derived this quality from their *commercial convenience and utility*, and that the statute was only a confirmation of it. Let us attend to their commencement and progress. "As commerce increased, (according

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Mont. b. 21.  
c. 11.

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“ to *Kyd*, in his treatise on bills and notes, p. 12.) the multiplicity of its concerns required, often, a less complicated mode of payment than by bills of exchange. A trader whose situation and circumstances rendered credit from the merchant, or manufacturer who supplied him with goods, absolutely necessary, might have so limited a connexion, with the commercial world at large, that he could not easily furnish his creditor with a bill of exchange on another man ; but his own responsibility might be such, that his promise of payment, reduced to writing for the purpose of evidence, might be accepted with equal confidence as a bill on another trader. Hence, it may reasonably be conjectured, promissory notes came to be introduced.” From this account, then, of their origin, by Mr. *Kyd*, it appears that notes were only used, at first, instead of bonds, being a shorter and more sensible mode of evidencing a debt ; and that they were *not used for negotiation*. But there is reason to believe that the merchants were very soon sensible of their great convenience in this respect, for we find them very early adopted as a money medium, and allowed all the properties belonging to bills of exchange. The question, however, whether they were negotiable or not, was, after some time, litigated ; and, upon looking into the cases in which it is considered, I find that the opinions of the judges on it, fluctuated a long while. At first, the decision was in favour of notes. In the case of *Nicholson v. Sedgwick*, 1 *Ld. Raym.* 180. in the common pleas, the court construed a note in the same manner as they would then have construed a bill of exchange. This case has been found fault with since, by Lord *Mansfield*, (in *Grant v. Vaughan*, 3 *Burr.* 1522.) but it was because it *did not go far enough* ; because it did not admit that on a note payable to *A. B.* or bearer, an action could be maintained by *the bearer*. Lord *Mansfield* on this occasion mentions, that it is difficult to discover, from the reports of the cases on this head at that time, *when* the question arises upon a bill, and when upon a note ; for the reporters use the words *note and bill promiscuously*. This evidently shews that they were then both regarded in the

3 Burr. 1525.

*same light.* Afterwards, however, in the court of king's bench, where Lord *Holt* presided, the negotiability of notes came more directly into question than it had yet been, and the decision was against it. I find, indeed, a case in *Ld. Raym.* 744. where Lord *Holt* has, in some degree, allowed it. But in the case of *Clerk v. Martin*, 2 *Ld. Raym.* 758.\* the report states that he opposed an action brought on one *totis veribus*. And notwithstanding the whole body of merchants were extremely anxious to carry this point, and had long settled it in their practice; notwithstanding, too, some of the other judges leaned strongly in favour of it; yet, Lord *Holt* pertinaciously adhered to his opinion; and the great authority which this appears to have had in *Westminster-Hall*, made others, at last, yield to him. 4 *Durn. & East*, 151. The merchants were, therefore, forced to apply to the legislature for relief, and the statute of *Anne* passed.

— But it is remarkable that in the preamble to this statute, it is recited, that, “whereas it hath been *held* that notes, &c. “are not assignable or indorsible over;” which strongly intimates that the opinion of the court was not thought right, and the statute was made to remedy it. And this construction is directly given it in the case before mentioned of *Grant v. Vaughan*, by Mr. Justice *Wilmot*, who says “it

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3 Burr. 1527.

and not to introduce any new law.

From this historical view of the doctrine of assignments of choses in action, I think it is manifest that they are now neither odious nor dangerous, but that modern decisions rather give encouragement to them; and that the position which I laid down is a just one, namely, that the *commercial use* of any chose in action, whatever might be its form, is alone sufficient to make it negotiable. It was so with bills of exchange: it was afterwards so with promissory notes. For, although these last are declared negotiable by the sta-

\* Mr. *J. Gould*, in this very case, declares, that he did not remember that it had ever been adjudged that a note, in which the subscriber promised to pay to *I. S.* or bearer, was not a bill of exchange.

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tute of *Anne*, yet, it is very clear, that if it had not been for the obstinacy of Lord *Holt*, such a statute would have been unnecessary. These are the grounds, then, on which negotiable instruments stand in *England*. It will be said, bonds are not admitted there as such. I answer, they have not yet been wanted there for negotiable purposes. But if general utility, and a convenience to trade, have been allowed to legitimate the negotiability of bills and notes, and if these are the true principles on which that quality depends, bonds have, in this country, a very strong claim to it, founded on these principles. When I urge their *convenience to trade* as a ground, I do not mean the trade solely of merchants, but the *general dealing of the whole society*. This is what is understood, always, when speaking of the commercial use of bills of exchange, or promissory notes. Any man who is not a merchant may draw a bill, and it will be negotiable. So will be the note of a planter, if made payable to order, although it circulates only among planters.

Let us advert now to those extraordinary circumstances which have given to bonds a claim to this new character, in this country. Before the revolution, it is probable, they were as seldom transferred here as they have been in *England*. The paper-money of the country, with the specie then in circulation, were fully adequate to all the purposes of trade and general exchange. But, on this great event taking place, peace and independence opened splendid prospects to the poorest man in the community. Each one felt his resources swell, and believed them equal to any speculation. The delusion was almost universal; even the most sensible men fell into it. Some bought lands and negroes; others adventured in commerce; all engaged in extensive schemes of private advantage. There was, at the same time, a large domestic debt to be settled, which had been accumulating during a long war. To answer these various demands for money, the little specie which the *British* had left was very inadequate, and the paper-money was now annihilated. Old bonds and notes were therefore substituted, and became the chief circulating medium of the state. They

served extensively for the purchase of every kind of property, and they answered, by negotiation, the beneficial end of settling a great part of the debt of the citizens. There never was a period in *England*, or in any other country, when bills or notes were more useful than bonds were at that time in this. Their utility was not confined to one class of men, as was the case, for a long while, with bills of exchange; nor were they, as Lord *Holt* contemptuously said of notes, "invented in *Lombard-street*;" but they were instruments long recognised by the law, and adopted as a kind of paper currency, by the whole community.

If, then, general use and general dealing made notes negotiable, I infer that bonds may become so, since the same principles operate so strongly in their case. And therefore, if the position was true "that a negotiable contract could not be raised by a blank indorsement on an instrument that is not itself negotiable," yet a bond would, in this respect, be sufficiently qualified. I do not mean, however, to say that the *original contract* of a bond may become negotiable; I think that there are sound reasons against it; all that I would insist upon (and I beg I may be so understood) is, that a bond may serve as the instrument of a negotiable contract by indorsement, in the same manner as a bill or note not originally made payable to order.

What then would be the decision on such a bill or note?

In the case of *Hill et al. v. Lewis*, 1 *Salk.* 133. it was held, even by Lord *Holt*, "that an indorsement of a note *not payable to order*, makes the indorser chargeable to the indorsee, though not the maker of the note." This case expressly proves that an indorsement on a chose in action, *that is not negotiable*, creates, notwithstanding, an implied warranty in the indorser. It is most probable that this was a *blank* indorsement; for this kind has been always more frequent than the indorsement in full. This case, then, is exactly similar to the present one. It may be said, indeed, that it was determined after the statute of *Anne*, but that

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circumstance can make no difference.\* For, admitting that the statute was really the first parent of promissory notes, yet, it only makes a note that is *not payable to order* a legal instrument; it confers no negotiability on it. But a bond has been always recognised as a legal instrument, and is, in every respect, the same as *such a note*. The statute creates no distinction; nor can reason distinguish between them. One is an engagement to pay money to a particular person *only*; the other is the same thing, and nothing more. The equity against a bond adheres to it always; so any equity or legal discount against a note, *not payable to order*, will accompany it in the hands of every assignee; for the action in both, must be brought in the name of the first payee. They are also the same in a commercial view. A note *not payable to order*, has no more resemblance to a bill of exchange than a bond has. It is made analogous to it by *indorsement*. So a bond, when it is indorsed, becomes an *order* from the *indorser* on the *obligor*, to pay to the *indorsee*; which is the very definition of a bill of exchange. It is the one given by Lord Mansfield, in 2 Burr. 676. And it was declared by the court, in 2 Ld. Raym. 1397. that no precise words are necessary to be used; “Deliver such a sum of “money,” makes a good bill of exchange.

It appears then from this case in *Salkeld*, that it is no obstacle to the negotiability of an *indorsement*, that the original contract of the instrument on which it is made, is not negotiable. The indorsement there, was not considered as *assigning* a right, but creating an *original* one. And the question here is not whether the assignee of a bond can recover in his own name from the obligor, by virtue of the

\* It seems that Lord Holt's aversion to promissory notes had prevailed so far as to deprive them of all legal existence; and for some time before the statute passed, no action of any kind could be brought on them as *instruments*. Even the payee of a note could not maintain an action against the maker; he was obliged to declare on an *indebitatus assumpsit*, disclose the consideration, and give the note only in evidence. When the statute passed, it restored negotiability to such notes as were drawn payable to order; but to such as were not drawn so, it only restored a legal existence. 4 Durn. & East, 154, 155. 2 Ld. Raym. 758. 4 Durn. & East, 154, 155.



indorsement—but whether a new and original contract is not created by it, between the indorser and indorsee? I can see no legal objection to it; on the contrary, it appears that every reason for it in the case of a note, applies forcibly in the case of a bond. Might not even a *forged* note serve as the instrument of a negotiable contract by indorsement? Then why not a bond? The truth is, that the original contract is not regarded. Whether negotiable or not, or whether void or not, makes no difference as between the indorser and indorsee. “Every indorsement,” says Lord *Mansfield*, “is a new contract.” It is immaterial of what nature the instrument is; it is sufficient if the indorsement is used for *negotiation*.

This doctrine is fully established by a great number of cases. It is directly held in the case quoted from *Salkeld*. It is directly held also in the case of *Langstaffe v. Russell*, *Doug.* 406. for in that the indorsement alone was considered, and there can be no doubt that the decision would have been the same, if the blank checks there had been filled up as notes *not payable to order*, which would have been the same as *so many bonds*. It is further confirmed in 2 *Burr.* 674. 3 *Burr.* 1354. *Doug.* 611. 617. 2 *Black. Rep.* 1269. But it is more completely established in the case of *Bay v. Fraser*, which I will now proceed to consider.

It will be necessary first to state the substance of that case.

A bond of *Thomas Elliott* for 200*l.* to the defendant, *John Fraser*, was transferred by him to *John Hall*, by an indorsement in these words: “Pay the within to *John Hall*, “or order, for value received.” It was afterwards indorsed in blank by *Hall*, to the plaintiff, *Mr. Bay*, who brought an action against the first indorser, *Fraser*. It appeared in evidence, that the debtor, *Mr. Elliott*, was insolvent at the time of the first indorsement, and was therefore never sued. This cause was tried in *June*, 1790, before Mr. Justice *DRAYTON* and myself, and we were of opinion, upon general principles, and on the authority of the case in *Salkeld*,

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that the indorsement on the bond made it a bill of exchange, as between the indorser and indorsee.\* The jury being of the same opinion, found a verdict for the plaintiff.

In quoting this case, I would not be understood to rest the authority of it on the opinion of the Judges who tried it; because that opinion (I speak at least of myself) was suddenly formed, as is always the case on any jury trial, and therefore ought not alone to have the weight of a precedent. But there is still a strong reason why this case should be regarded as a respectable authority. The verdict given in it, was the judgment of a special jury of some of the best informed and most judicious merchants in this city, on a great commercial question. And this verdict has directly determined that a bond may become the instrument of a negotiable contract by indorsement. In doing which, it worked no mischief. It did not interfere with the original contract; it did not take from the obligor of a bond any equity he might have; but only determined that a bond, like a note not originally negotiable, may become the foundation of a new contract, which shall be so.

Let us examine now the difference, which was so much relied on, between that case and the present. It was contended, that in the case of *Bay v. Fraser*, the indorsement was *filled up*, which, it was admitted, made it a bill of exchange; but that in this it is *in blank*, which has the effect only of a common assignment.

I have attended with great care to every thing that has been said in support of this distinction; but I have heard nothing that satisfies me that it has any legal foundation.

What is a *blank indorsement*? Not a thing of doubtful nature, or of various import. It is a *technical* form, that means exclusively a *commercial* transfer; contrived by the merchants as a shorter and more emphatical mode of giving negotiability to a chose in action, than an indorsement in full. There is no other kind known either in law or custom;

\* Mr. J. DRAYTON was also inclined to think that the assignor having received a valuable consideration, raised an *implied warranty*. At that time I thought differently—I have now changed my opinion; my reasons for it are given in the latter part of this argument.


and these have invariably given to it the same construction, as to the indorsement in full. It is in effect a mercantile abbreviation of the words "pay the within to *A. B.* or order;" which is the indorsement in the case of *Bay v. Fraser*.

But it was insisted that this was not the effect intended to be given to a blank indorsement in the present case. How does this appear? Not, certainly, from the indorsement itself. "It would be false logic," says Mr. J. Buller, (in *Hodgson v. Ambrose*, *Doug.* 329.) "to put a different sense upon any words from what, *in general*, they import, by mere inference from the words themselves, unexplained by any others." It was insisted, however, that the popular construction is different, and that a blank indorsement on a bond means only a common assignment. I am aware that it was sometimes the practice, formerly, to assign a bond by the assignor only writing his name on the back of it; but he *affixed his seal* to it; and there was always a witness to the act, who also signed his name; all this, too, was done at the bottom of the bond, to leave room for filling up the lengthy form of an assignment; every thing, therefore, denoted that a common assignment was intended. But here there are no such indications; here is singly the name of the indorser, written in the way it is always done on a bill or note, and which all the world understands as a negotiable transfer. If a common assignment was intended, why was not the old form adhered to? Or why not adhere to the type of it, which would have been very little trouble? Why adopt a form that is purely negotiable? The inference is, that a negotiable effect was intended. This is certainly the legal construction of it; and, in my opinion, it is the popular one also. Many, no doubt, have understood it differently; but I believe if the sense of the whole community was taken, it would be found that most men have understood that, when they put their names in this way on bonds, they made themselves ultimately liable if the obligors were insolvent at the time; and where a person has intended not to make himself so liable, he has usually stipulated specially

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against it. The general experience of the bar will determine whether I am right or not. But, admitting that this sense did not predominate, yet, there is one fact that cannot be denied, which is, that the popular sense is at least *doubtful*. This, alone, is, in my judgment, decisive for the plaintiff; and we are bound to give to this indorsement a technical construction.

Wherever a particular intention is allowed to control the legal effect of words, the law requires that such intention shall be either expressed by other words, or be necessarily implied. If it is doubtful, it never can prevail. It is so in the case even of a will, in which the intention is allowed a greater latitude than in any other. It was so determined in the case of *Calhoun v. Anderson*, where an indorsement, on a copy-writ, of the words "special bail," and subscribed by the defendant, was held equivalent to a formal recognisance. It was there urged, as has been done here, that the defendant did not mean the indorsement in its technical sense. The opinion then declared by the court, is the opinion I now hold, "that where a man uses technical words, and does not explain or restrain them by any others, we are not at liberty to say that he did not understand their technical meaning, and that he shall not be bound by it." Here there is a commercial transfer, which implies a collateral security. A *blank indorsement on a chose in action* was never known to be used for any other purpose; and custom and law have universally affixed this single meaning to it. There appears, on the other hand, no legal intention to the contrary. I say legal intention, because the law suffers no other intention to vary the technical import of words, than such as is expressed by other words in writing. Here there are no such, nor any formal act; such as a seal, or other thing, which might be equivalent to other words. How then can we say that this is not a commercial transfer? Or how can we, consistently with the rules of law, give to this indorsement any other sense than that which the law has imposed on it?

the case of *Bay v. Fraser* is also applicable to this point. That, although the indorsement was filled up, yet the indorsement expressed no warranty. The words "I pay the balance to *Jo. Hall*, or assign, if received by their literal sense, only amounted to a transfer of the debt: and I remember this was strongly insisted on; but these words made a negotiable transfer, and there was no other words to the contrary; they were therefore construed imply a warranty. That is precisely the present case; I can see no difference between them. They both rest on the same general principles; and if this case cannot be supported by them, the doctrine in the case of *Bay v. Fraser* ought not to stand.

I will now consider this indorsement in the second light in which it was viewed, viz. as a common assignment. The opinion I have already declared on a different view of it, might indeed excuse me from considering it in any other. But as I am of opinion also, that in a case of a common assignment, the plaintiff is entitled to a remedy, I shall, without entering into any lengthy discussion, state shortly the reasons on which I found this judgment. It was contended for the defendant, that a common assignment (which it was said this indorsement was) implies no warranty, but only a covenant that the assignor will permit the assignee to receive the debt to his use; and a passage from the civil law, with several cases from the common law, were quoted\* as supporting that position. I have hitherto deferred taking any notice of these cases, because in viewing this indorsement as a negotiable transfer, they could not possibly apply; for if a bond thus indorsed assumes the nature of a bill of exchange, it must be governed by the law of merchants. Neither the civil law, nor the old common law, ever contemplated a bond in this shape and character. The cases from the common law,

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\* These were 1 *Demat*, 79. 1 *Just*, 232. 1 *Mod*, 113. 1 *Ld. Raym*, 683. 2 *Ld. Raym*, 1241. 12 *Mod*, 554.

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all relate to a common assignment drawn in the regular form, and expressly proceed on the construction of the word "assignment" used in that form; they can only therefore apply to this indorsement as viewed in that light. But even in this application of them, they do not, in my opinion, decide any thing, and ought not to have any weight. The whole amount of what they all say is this, that one effect of an assignment is a covenant that the assignee shall receive the money to his use; but they none of them say that this is the *only* effect. Nor is this a necessary inference from them. It would be false reasoning to infer that, because the law gave a remedy for one injury, it would refuse a remedy for another. The rule of "*expressio unius est exclusio alterius*," is not justly applicable to them. It applies only to statutes, contracts, &c. For it is not always that the court in construing a thing, declares all its legal consequences; it was very unusual for the judges formerly to do this; and it is only since the time of Lord *Hardwicke* and Lord *Mansfield*, that we meet with complete illustrations of any doctrine of law in a single case. But I do not rely on the inapplicability of these cases. I take a very different ground. I will admit that if this point had been then considered, the court would have decided (as the counsel for the defendant contended) that there was no warranty implied on an assignment of a debt, unless there was some fraud in the assignor. Such a decision would most probably have then been made, for two reasons. 1st, Because the judges of that day still preserved some veneration for the old law of maintenance. 2dly, Because the law of implied warranties, as it then was, would have justified the decision. But I think I have shewn that the law of maintenance, as it respects this case, has been overruled; and it will fully appear, upon a further examination, that the law of implied warranties has materially changed from what it formerly was.

It is proper here to state, that an assignment of a debt is a contract in nature of a sale. It is expressly declared to be so by the civil law. It must therefore be governed

by the general law relative to sales, unless some particular exception can be shewn in the case of a debt.

I will not deny that such an exception was made by the civil law. In the passage from *Domat*, it is said, "the seller of a debt ought not to warrant that the debtor is solvent; for he sells only the right." There was no warranty, therefore, unless the seller specially agreed to it, "*niſi aliud convenit*." But a contrary rule is laid down for

all other sales. It is said, under the same title, that the seller is answerable for all the defects of the thing sold, by *natural warranty*, whether they are known to him or not;

"for he ought not to reap the advantage of an apparent

"value which the thing seemed to have, and yet had it

"not." This principle is made to extend to all contracts;

and to all covenants. Why then was this exception made in the case of a debt? The reason is not given here. My

own conjecture is, that it originated in the same cautious policy that gave rise to the old law of maintenance in *En-*

*gland*. The civil law does not indeed go so far as to prohibit the assignment of a debt, but it probably intended by this rule to discourage it. And the general dealing of the

*Romans* did not require the contrary. The making *choses*

*in action* subservient to the purposes of trade, was not known or even wanted among them. According to *Mon-*

*tesquieu*, the *Roman* people troubled their heads very little about trade. They were not jealous of *Carthage* because

she rivalled them in this respect, but because she rivalled them in glory. Their military education, and even the

form of their government made them averse to commerce; and it was a saying of *Cicero*, "that he did not like that the

"same people should be at once both the lords and factors

"of the universe." Their laws, therefore, shew very little concern for the interests of commerce in any shape; they

are totally silent on the subject of negotiable paper; and the passage here quoted, with another under the title *delega-*

*tion*, 1 *Dom.* 494. are all that I can find respecting the transfer of a debt.

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Vol. 1. 72.

Id. 76.

Id. 80.

Id. 53. 244.

Book 21. c. 10.

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If I have assigned the true reason for this rule of the civil law, it ought now to cease like the old common law maxim, for the reason has long since done so; and I might venture on this ground to deny its authority. I might also insist that the civil law has no intrinsic obligation here, and that it can only recommend itself as a rule of reason; and on this ground too I might deny its authority. But I feel more directly authorised to do this, when I find the contrary rule of the civil law fully recognised by the decisions of this court, and confirmed by the soundest principles of our own law.

I have said that the law of implied warranties was very different now from what it formerly was. It has changed even within a few years. By the common law, an action on an implied warranty could not be supported, unless there appeared to be some *fraud* in the seller. In 2 *Black. Com.* 452. it is laid down, "that the vender of wares is not bound to answer for the goodness of them, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used some art to disguise them." So it is said by Lord *Mansfield*, (*Doug.* 20.) "that on a sale even for a sound price, if the thing sold proves unsound, and there is no express warranty, it ought to be *laid* that the seller *knew* of the unsoundness." If it is necessary to *lay* this, it is necessary by the rules of pleading, to *prove* it. So that a warranty, according to these authorities, can only be implied on the ground of some fraud in the seller. I remember to have found myself bound by these great authorities to state the law in this way on more than one occasion, after my appointment to this seat, and it was some time before I felt at liberty to depart from them; not because I thought the doctrine just or reasonable, but because it was the law. But the broad rule of the civil law, which implies a warranty on every kind of contract was constantly contended for by the bar, and the strong reason and justice of this rule weighed so much with juries, that it was always recognised by their verdicts, and has now become as completely established in



this court as any other rule of law. Numerous decisions both here and on the circuits, will therefore authorise me in stating the law of implied warranties at present to be this.

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When a man buys a thing, he buys it for some certain use and benefit; he does not mean to give his money for nothing. If, therefore, the thing sold has any defect which will prevent him from receiving the benefit he expected from it, he has been deceived. This happens, sometimes, by the fraud or misrepresentation of the seller; in which case it never was doubted that the seller would be liable. But it may happen also by the thing appearing to have a value which it has not, and this without the knowledge of the seller, or any fraud on his part; this is what the civil law calls "*dokus re ipsa*," a cheat, or defect, in the thing itself, and is expressly distinguished from fraud: in this case, too, if the defect is of such a nature as to make the thing useless, or materially disappoint the views of the buyer, so that, if he had known it at the time, he would not have bought, the contract is void, and the seller is bound, not only to restore the money he has received, but to indemnify the buyer for the charges he has been put to by the sale. This is agreeable to the rule of our law, "that where one of two innocent persons must suffer, he who has occasioned the mischief shall bear the loss." It is agreeable also to another rule of law, which says, "that when money is paid on a consideration that fails, the party receiving is bound to refund it." 1 Dom. 244. 1 Dom. 83.

Now, let us apply these rules to the present case. The plaintiff pays money, or gives some other value to the defendant, for a bond which turns out to be worthless, the debtor being insolvent. I agree that it is necessary that this insolvency should have existed at the time of the transfer, for a defect which vitiates a sale must be one inherent in the thing at the time it was sold, and not a subsequent one. But the debtor here was insolvent at the time of the transfer of the bond, because the special verdict states that all due diligence to recover it was ineffectual. There was, therefore,

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an *inherent* and *essential* defect in it; for the value of the bond does not consist in the paper or writing, but in the solvency of the debtor, and his *insolvency* renders it a *nullity*. The plaintiff, then, has been deceived. He expected that the sum due on this bond could be recovered. It is too absurd to suppose that he intended to buy only the *rights*. This might be an empty thing. It might subsist, and yet be productive of no benefit; and he would not be so foolish as to pay his money for the right of bringing an action that would yield him nothing. Men have been vain enough, sometimes, to purchase empty *dignities*, but it would be a curious kind of vanity to buy, at a great price, the right of going to law. It is much more reasonable to presume that the plaintiff meant to buy the *fruits* of this right, which was the money which was to proceed from it. If, then, the bond could not be recovered at the time it was sold, the plaintiff's views in buying are totally frustrated; for the bond can be of no use to him; it is even more worthless than "a beam" that is rotten, or a broken-winded horse," which are the examples given, by the civil law, of defects sufficient to dissolve a sale. The contract therefore, in this case, ought to be rescinded. The consideration on which the plaintiff has paid his money has failed, and the defendant, "*ex æquo et bono*," ought to refund it.

This principle is deeply founded, both in reason and justice; it is perhaps the most extensive in the law.

If the assignment of a bond is not in nature of a sale, (as I have stated it to be,) or if it is in any other contract, this principle will still reach it. It governs, universally, all contracts; it extends even to *illegal* ones; and the "*particeps criminis*," as well as the most favoured party, may avail himself of it.

In the case of *Walker v. Chapman*,\* (stated in the case of *Lowry v. Bourdieu*, Doug. 454.) a sum of money had been paid, in order to procure a place in the *customs*. The place had not been procured, and the party who had paid the

money brought his action to recover it back ; it was held that he should recover. So, in the case of *Adams v. Stokes*, 4 *Durn. & East*, 564. where the contract was also an illegal one, Mr. J. Buller says, " in the case of illegal contracts, " one party cannot recover against the other on the contract " itself ; but if he comes to rescind it, he may recover back " so much money as he paid." Will then a court of justice give a remedy in contracts which the law prohibits, because the consideration fails, and will it deny it in one which the law sanctions ? After these cases, one would conclude there would be no possible contract which could elude this powerful and searching principle. It would be tedious to quote the numerous cases in support of it. The books teem with them. I have referred to these only, because they carry the principle as far as it can go.

There is one objection more which I will take notice of. It was much insisted on, by the defendant's counsel, that the transfer of bonds was a gambling kind of commerce, in which large discounts were made, on account of the risk of recovering them ; and that if they turned out bad, the assignees were to bear the loss. But this is not a fair representation of the case. I admit that a few monied men have availed themselves of the scarcity of money, and the necessities of those who were obliged to sell their bonds, and have bought a great number at considerable discounts for cash. But was this owing to the buyers' running the risk of being paid ? This could not be the reason, because notes that were *negotiable* were bought at the same rate ; and if these proved bad, the indorsers of them were unquestionably liable. It must have been owing, then, to a different reason. In my opinion, the only true one was the *scarcity of money*. This depreciated not only bonds but every kind of property. It gave to money a relative value far beyond its usual standard, and lessened, in the same proportion, the value of every thing else. Negroes, the most productive property we own, were sold for half price, as well as bonds. Lands were still more depreciated. Now, I would ask, if any of these, on being sold, were discovered to be so defective as to be use-

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less to the buyer, would it be an objection to an action to recover back the money paid, that the property was bought for less than its value? As the law is now settled, it certainly would not. And why should it be an objection in the case of bonds? Although a bond may have been bought at a great discount, yet, if it was worth nothing at the time it was transferred, has not the consideration failed, and ought not the money paid for it to be refunded? Surely, the buyer of a bond has as high a claim to relief as the party to an *illegal* or *corrupt* agreement. His contract offends against no law, nor is there any fraud or immorality in it. And yet we have seen that, in contracts so polluted, the parties who have paid money on *void* considerations shall, notwithstanding, be relieved.

There appears to me, therefore, to be no more weight in this objection, than in any other. This too is viewing the subject in the most unfavourable light. It is also a partial one; for it is not generally true, I believe, that bonds were transferred from one to another at large discounts. Many, no doubt, were; but the greatest number, I am convinced, have passed at their full value. An indulgent creditor, in many others, has consented to accommodate his debtor by giving up his bond for the bonds of other persons, and when he has received these, he has delivered up his debtor's for the same amount. In all these cases, a full equivalent is given for the bonds that are assigned; and it cannot be pretended that any allowance is made in the price for the risk of recovering them. If then, in any of these cases, the bonds should appear to have been worthless at the time they were assigned, will it be denied that the consideration has failed? Did the seller of valuable property mean to be paid with waste paper, or the indulgent creditor to be requited for his kindness by the loss of his debt? This would be too absurd a presumption. They expected an *equivalent*. The assignors also of the bonds intended to pay an equivalent for what they had received; and if they had not done so at first, they are bound to do so afterwards. Nor is there the least hardship in their case.

The bonds were worthless, if the obligors were insolvent when the contracts were made ; and they would have continued to be so if they had not been assigned. If, therefore, the contracts should be rescinded, and the parties replaced *in statu quo*, the assignors will be in no worse condition. And if, instead of that, they are compelled to make good the amount of the bonds, they will be only paying *for the first time* for a valuable and ample consideration, which they have already received. I will only add, that it does not appear that the present case is not one of these ; and it is fair to presume that there is both honesty and good conscience in it. If, however, it is otherwise ; if the demand is unreasonable, the defendant may have relief elsewhere.

On every ground then, and in every view of this question, I am of opinion that judgment should be for the plaintiff. All the cases, and all the doctrine on the subject, proclaim this universal rule, " That the law will not suffer, " in *any* contract, one man to take money from another, " and give him nothing in return." As the facts in this case bring it fully within this rule, I infer that the plaintiff has a right to recover. If the indorsement is considered as a negotiable transfer, he has to recover on the special instrument ; if as a common assignment, his right is equally clear on the count for money had and received.

I am sorry to have taken up so much time. But I thought it necessary to do so, as I differ from those whose opinions must have great weight. I have endeavoured to justify my opinion on those grounds on which every judicious one ought to stand—I mean the grounds of law. Whether I have succeeded or not, I have at least the satisfaction to know that I have exercised my judgment in the best manner I was able.

BAY, J. The principal objection which is urged to the plaintiff's recovery in this case is, *that a bond is not in its nature negotiable, so as to enable the holder to bring an action*

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*in his own name*; that even an *assignee* in due form, cannot sue in *his name* for the amount, but must sue in the *name of the obligee*. To support this objection, have been cited, 1 *Inst.* 282. 12 *Mod.* 554. and 1 *Ld. Raym.* 683. Before I proceed further, I would observe, that these two last cases cited by the defendant's counsel, shew expressly, that although a bond is not a negotiable instrument in its nature, yet a contract may be formed upon it between the assignor and assignee, which shall be binding on them, where the obligor is entirely out of the question. It was next urged, that the passing the bond in the manner stated in the special verdict, was a bare *relinquishment of a right*, which raised no obligation. To this, however, it may be answered, that the finding of the jury in the verdict implies a sale; for it states, that it was given in payment to the plaintiff by the defendant, for a valuable consideration, which amounts to a sale in law. The transaction may be considered also as an exchange; and if so, it is clear that all exchanges are governed by the same rules of law which regulate sales. The case cited from *Domat's Civil Law*, 79. where it is said, that "in transfers of a debt, one ought only to warrant that it is *really due*, and not that the *debtor is solvent*," seems to be rather a rule laid down, by which prudent men should govern themselves, than a binding or universal principle, which is to govern contracts. For the same author, in treating further on the same subject, (page 494.) says, that "the assignment of a debt, is as it were, the sale of what is owing by a third person;" and all sales imply a warranty.

By the principles of the common law, I do not see that the want of negotiability in the bond, affects in the least the contract between the indorser and indorsee. Had the dispute in this case arisen between the indorser and obligor, then I confess all the reasoning on the part of the defendant, would apply. But their arguments tend chiefly to shew, that the holder or assignee of a bond, cannot maintain an action in his own name against the maker of it. This has not been denied. The real question before us is, whether

a *separate* and *distinct* contract cannot be made upon a bond between the obligee and a *third* person, not named in the bond. I think there can ; and that the present is a contract of that description, will appear evident from the analogy between other choses in action and promissory notes, before the *statute of Anne*. Before this statute, notes of hand, like bonds, were not negotiable. They were only considered as mere assumptions to the payee ; yet if a note was indorsed over by the payee to a third person, it became a *new* contract between such payee and the person who held it ; and the indorser of such note was liable to him for the amount, although he could not sue the maker of the note in his own name. So in like manner, a note payable to the bearer (which is not negotiable) is recoverable against an indorser, if he indorses it over to another. The cases cited from *Salk*. 133. and *Holt*, 117. are in point on this head. They both agree that although a bill made payable to *I. S.* or *bearer*, be not negotiable ; yet if it be indorsed, the indorser shall be liable : because every indorsement is a new bill, and shall have the same effect between the indorser and indorsee. Now if this were the case on promissory notes before the statute, and on bills payable to bearer, neither of which were negotiable in their nature, what is to prevent a similar kind of contract from being made on a bond ? Is there any thing in the seal and wafer attached to a specialty, which prevents this new contract from being made on it, more than upon notes and bills ? I can see none. The case of *Bay v. Fraser* has settled this point fully, and established the doctrine that such a contract may be made upon a bond, so as to be binding between the indorser and indorsee. But in order to distinguish the cases, it is said, that the indorsement upon the back of the bond in that case, was filled up and signed by the obligee, at the time it was transferred, and that it was made payable to *order*, which gave it a negotiability from him for the amount of the contents of the bond. That it was, therefore, in nature of a bill of exchange drawn upon the bond ; and upon that ground the plaintiff recovered ; whereas, in

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the present case, it is said, no such bill was drawn, only a blank indorsement made, which imported no more than a bare relinquishment of the obligee's right. In order to give an answer to this last objection, it will be necessary to consider the intent of the parties when this negotiation took place; for it is a rule of law, which is founded in wisdom, that the intention of the parties, when it can be discovered, ought to govern in all contracts. (*Pow.* 372.) But in order to throw greater light on this subject, it will be more regular to take into view the situation of the country at the time this contract was made, and the causes which occasioned this species of transfer.

It will not be denied, that the revolutionary war, and the necessities of the citizens, which sprang out of it, threw a vast number of bonds and securities for money into circulation, far exceeding all calculation. In the first place, a great number of debts and demands remained over and unsettled, from the commencement of hostilities until the peace; when the creditor was restrained by an act, from suing and recovering; (except for interest;) but he had a right to bonds payable by three instalments, and security for the principal. This regulation, consequently, threw three times the number of bonds into circulation than would have been otherwise requisite for all those debts. All the confiscated property was sold upon a credit of one, two and three years, agreeable to the principles of the act for the recovery of debts, with bonds payable at these periods. This, therefore, added greatly to their number. Upon the same principles also, almost all the sales of private property of that day, were likewise made on a credit of one, two and three years. So that in fact, instalments and instalment bonds seem to have been, at that time, the order of the day. The *sheriff's sale bill* which passed about the time these bonds became payable, which permitted a tender of *pine barren* land to the creditor in satisfaction of the demand, threw a further impediment in the way of recovery of debts, until after the adoption of the late federal and state constitutions. During this period, the current coin had



been gradually drained out of the country, so that there was scarcely any circulating medium left for the payment of debts. In this situation of things, many honest men were desirous of paying off their debts, but could not raise money for that purpose, although they had good bonds in their possession, bearing interest. Necessity, therefore, gave rise to an offer of these bonds in payment, and the creditors finding they could not well better themselves, in many cases accepted them in payment; and thus it happened that bonds to an immense amount were sent into circulation. And it is certain that they relieved the distresses of the citizens exceedingly, as they passed by common consent from hand to hand, as notes of hand or any negotiable paper; and for the greater ease and facility of transferring them, the custom of signing the obligee's name, without any writing above it, was introduced, so as to enable the holders to make any use of it he thought proper. It must be recollected, however, that by far the greater part of these bonds were passed off in payment of debts; and others were given for purchases made at sales; in both which cases, a full value was given for them by those receiving them in payment. It is very probable that many bonds were passed off greatly under value, and eventually became objects of speculation. But the special verdict in this case does not state this to have been one of that kind of contracts, and the court is not to presume it; it therefore cannot affect the general principle.

To return, however, to the subject of the intention of the parties. What was, or could have been the intent and design of the parties in nineteen-twentieths of these transactions? The intention, it is presumed, must have been fair and honest; and if so, then it must have been in the contemplation of the parties that he who was under the original obligation, and who had received a valuable consideration, should make good to him who had the right of demand, that which he gave in payment, in case of a deficiency, or insolvency of the obligor, whose bond had thus been passed away in payment of a just debt; and not barely, as has been suggested, that he was only to warrant that *the debt was due*

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*from such obligor.* This, I presume, is an honest construction of the intention of the parties, in all such transactions, and such as will promote good faith and fair dealing between man and man. Taking this then for granted, I think it may very justly be inferred that the custom of making a blank indorsement on a bond, was not only to authorise to sue and recover, as has been contended; but also to make what use the holder pleased of it, either for the purposes of an acquittal in case of payment—or to make the indorser liable, in the event of insolvency, on the part of the obligor. The case of *Russell v. Langstaffe*, *Doug.* 496. is strong in support of this point, where it is laid down, “that an indorsement in blank, will bind the indorser for any sum which the person to whom he entrusts it chooses to fill up, and it shall not lay with him afterwards to say it was not regular;” because such was the intent of the parties. If such was not the intention, why not make use of the old form of assignment known in law, and of which the books are full of precedents? This very circumstance proves to my mind, that this deviation from the old accustomed method of assigning bonds, was intended to introduce a new custom, both for the purposes of facility and security; and fully authorised the holder to write over the name of the obligee indorsed on the bond, a bill of exchange, or any thing else he pleased, so as to make him liable. This appears to me to be founded not only in reason and justice, but on the authority and analogy of sundry adjudged cases in the books. In the case of *Fenner v. Mears*, (2 *Black. Rep.* 1269.) it is laid down, that if the obligor of a bond himself, had put his name on the back of a bond, this would have raised a new contract between him and the assignee to whom it might be passed, that he would pay it, free from all discounts or incumbrances, as between him and the obligee; in which case *assumpsit* would lie by such assignee, against the obligor on such implied agreement, for the whole of the principal and interest on such bond; notwithstanding he might have had good discounts against the obligee, which must have been allowed him, if he had been sued on the bond in the name

of the obligee. This case appears so strong in point that there is no stepping over it. If then, the bare putting the name of the obligor on the back of the bond, raises a new contract between him and the holder, and obliges him to pay the whole, principal and interest, though he might have fair discounts to the amount of the bond ; surely, with much more justice, ought the obligee in the case under consideration, to be bound by his blank indorsement, to the holder for the amount of the principal and interest of the bond which he passed off for a full consideration.

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There is the same reasons for the law to raise the implied *assumpsit* in this case as in the one cited ; and for concluding that it was a new contract, to repay the holder in case of the insolvency of the obligor. Indeed, if we reason from analogy, the case is much stronger.

Again, it is clear law, that the intent of an indorsement is a warranty that the bill shall be paid. 3 *Bac.* 607. *Ld. Raym.* 181. *Str.* 497. And can any good reason be assigned, why such an indorsement on a bond should not amount to a warranty that the bond should be paid, as well as an indorsement on a bill of exchange? I confess I can see none.

There is still another ground, however, on which this case may be considered, which is stronger, if possible, than any of the former ones ; *that is the equitable ground for money had and received, and on the implied warranty upon every sale for a valuable consideration.*

The principal objection to this ground has been, that *choses in action cannot be sold* ; and therefore, that this principle of warranty will not extend to them. To this I answer, that both by the *civil* law, and the *common* law, *they may be sold*. I have already observed, that in *Domat*, 494. he says, that the assignment of a debt, *which is a chose in action* is, as it were, *the sale of a debt* ; which shews that the sale of a chose in action was well known and recognised by the *Roman* law ; for there are a great variety of rules laid down by him for their regulation and government. By the *common* law, they may be also sold ; and the case of *Mouldsdale*

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A chose in  
action may be  
sold, and as-  
sumpsit may  
be maintained  
upon it.

v. *Birchall*, *Black. Rep.* 820. is in point on this head. There, one *Aubins* was indebted to *Birchall* in the sum of 54*l.* or thereabouts, for goods sold. *Birchall* being in want of cabinet work, applied to *Mouldale*, a cabinet maker, and offered to sell this debt for cabinet maker's goods. Whereupon an agreement was made, and *Birchall* sold, and *Mouldale* purchased the said debt of *Aubins*, and promised to give him wares in payment; and for non-delivery of these cabinet maker's wares, the action was brought to the value of them.

To this there was a demurrer that this was a chose in action, and therefore not assignable; but judgment was given for the plaintiff. A writ of error was afterwards brought, and it was removed up into the Exchequer Chamber; when, after solemn argument before all the judges, the judgment was unanimously affirmed, that the consideration was a good one, and that *assumpsit* could lie.


Having now I think shewn, that a debt or chose in action *may be sold*, and that such sale is a good consideration in law to ground an assumption on, it follows, as a natural consequence, that every such sale must be governed by the same principles by which every other sale is governed. The first and most obvious principle, then, in every sale is, that *selling for a sound price* deserves a *sound commodity*; and if the thing sold should turn out unsound, or good for nothing, that then the purchase-money should be returned to the purchaser. *Doug.* 21. This is the doctrine of the civil law, which has been incorporated into the body of our common law, as part of the law of the land.

The reason and justice of these principles occasioned their adoption into the common law. They are not only agreeable to the eternal rules of justice, but absolutely and indispensably necessary for the preservation of fairness and common honesty among mankind. Lord *Mansfield*, in 2 *Burr.* 1012. speaking of this kind of equitable action for recovering back money had and received to one's use, says, "This kind of equitable action for recovering back money which ought not, in *justice*, to be kept back, is very *beneficial*, and therefore much encouraged. It lies in all cases

" where the party ought, *ex æquo et bono*, to refund. It lies  
 " for money paid *by mistake*, or upon a *consideration that*  
 " *fails* ; or for money got through *imposition, extortion, op-*  
 " *pression*, or an *undue advantage*. In one word, the gist  
 " of this action is, that the defendant, *upon the circumstan-*  
 " *ces of the case*, is obliged by *the natural ties of justice and*  
 " *equity to refund the money.*" It is not possible for words  
 to be more expressive, or language more forcible than Lord  
*Mansfield's*. They require no comment. In *Hawkes v.*  
*Saunders*, *Cowp.* 290. the same principles are further laid  
 down and confirmed by all the judges who delivered their  
 opinions, *seriatim*, on that important occasion. I shall not  
 here repeat them, but shall content myself by referring to  
 them.

From all these authorities, and from the best view I have  
 been able to take of this subject, whether it is considered on  
 the implied undertaking, the nature of the blank indorse-  
 ment-authorising the party to fill it up with a bill of ex-  
 change, or on the equitable ground for money had and re-  
 ceived to the plaintiff's use, it is my opinion that the action  
 will lie, and that judgment should be for the defendant.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURTS OF COMMON PLEAS**  
**AND**  
**GENERAL SESSIONS OF THE PEACE, &c.**  
**IN THE YEAR 1795.**

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**RICHARD GILBERT WALL *against* The COURT OF  
WARDENS.\***

An insolvent debtor, who fairly and honestly gives up all his estate and effects to his creditors, and takes the benefit of the insolvent debtor's act, is for ever afterwards discharged from his suing creditors, and those accepting of a dividend of his property.

**UPON** a motion for a prohibition. The plaintiff had been convicted, in the court of wardens for the city of *Charleston*, of selling spirituous liquors, and fined 50*l.* for the offence, under the terms of the act for regulating tavern licenses, &c.

He was afterwards taken on a *ca. sa.* and sent to gaol; but being unable, by losses and misfortunes, to pay the fine, he applied for and obtained the benefit of the insolvent debtors' act, and delivered up what property he had, agreeable to the directions of that law.

After the expiration of the year and a day from the time of his discharge under the insolvent debtor's act, a writ of

\* This case ought to have come in among those of 1792, but by some accident or other it was omitted to be inserted in its proper place.


*scire facias* was issued against him by the court of wardens, in order to renew the judgment on the conviction, and charge him a second time in execution for the above 50%. The present was, therefore, a motion for a prohibition to that court, to restrain it from proceeding further in the case, on the ground that a person once taking the benefit of the insolvent debtor's act, and giving up all his effects, was for ever discharged from every demand for which he was sued or imprisoned.

On behalf of the court of wardens, it was contended, that the insolvent debtors' act never intended to discharge the debtor entirely from the demand, only to give him indulgence to raise the money for which he was sued; and therefore it prevented any person from suing such debtor for one year and a day after the discharge; but it did not follow that every creditor was obliged to sue at the expiration of that time: some might indulge him to a much longer period, and still recover; though every one might sue after that time if he chose.

For the plaintiff, *Wall*, it was urged, that such a construction as the corporation insisted on, would be so far from giving relief to an unfortunate man, who had parted with every shilling he had in the world, on his coming out of gaol, and who was about to begin the world anew, would in fact be tantalizing with misfortune, and making him the sport of every rigorous creditor who chose to renew his suit at the expiration of every year and day during his life. That it would damp all enterprise and industry which an active man was still capable of exerting at any future period; and would prevent the aid and interposition of friends who might afterwards be disposed to serve him by giving him a credit, lending money, or otherwise assisting him, which, it was said, was contrary to the spirit and meaning of the insolvent debtor's act.

The Court took time to consider of this case, and, after mature deliberation, was of opinion, that a man who, without fraud or concealment of any part of his estate and effects, gives up his all, and comes out of gaol under the insolvent

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debtor's act, is for ever discharged from the demands of his suing creditors, or those accepting of dividends of his estate and effects.

That the intention of the act was to give *effectual relief* to poor unfortunate debtors ; and *not a temporary one*, that would again, in so short a time as a year and day, put them in the power of rigorous creditors. That the act contemplated three different classes of creditors—to wit : 1. Suitors or suing creditors. 2. Those coming in and accepting of a dividend of the insolvent debtor's estate and effects. 3. Those who had neither sued nor chose to accept of a dividend.

Those creditors who have neither sued the insolvent debtor, nor accepted of a dividend of his property, are restrained from suing him until a year and a day from the time of such discharge.

They may, however, prove their demands, against which the limitation act shall not afterwards be a bar.

That the clause of *release and discharge* in the act, related only to the two first classes ; but the third class, who had neither sued nor accepted of a dividend, was prevented from suing until twelve months and a day next after such discharge.

That this was the intent and meaning of the act, is manifest from the 10th and 11th clauses of it, which will fully confirm and explain this construction. The 10th clause enacts, that the act of limitations shall not run against such creditors as had *not sued*, or accepted of *dividends*. And the 11th clause gives *such creditors* a power to prove their demands in the court where the insolvent debtor should apply for discharge ; and enacts, that a certificate of the clerk of the court, should always be conclusive evidence of the debt, against which the statute of limitations should not be a bar. There is not one syllable said in either of these two last clauses about the suing or accepting creditors. And if in any part of the act, subsequent to the discharge, it had considered their demands as still in existence, they would have been mentioned in the clause which says the limitation act should not be a bar to the other creditors ; and to prove which, this kind of *ex parte* testimony was to be conclusive. It is evident, therefore, from the silence of the act in those two clauses, respecting the two first classes of creditors, as well as from the general scope and design of



it, the first enacting clause of discharge took leave of them for ever, and considered their demands as totally extinguished.

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CHIEF JUSTICE, WATIES and BAY, Judges, present, who ordered that a prohibition should issue.

Mr. Justice GAIMKE was present at part of the argument, and at first doubted, but afterwards concurred with the three other judges.

Mr. Justice BURKE was absent at *New-York* when this argument came on; but has since agreed in opinion with the CHIEF JUSTICE and other judges: so that this may now be considered as the unanimous opinion of the whole court.

*Harper*, for the motion.

*Lee* and *Marshall*, against it.

RUSSELL against LITHGOW.

January  
Term.

DEBT on a bond. The defendant, *Lithgow*, signed the bond on which this suit was instituted, together with three others, to the nominal plaintiff, *Russell*. It is joint and several.

An assigned bond is a good discount in the hands of an assignee, under the discount law of 1759.

This bond was afterwards assigned by *Russell* to the late Col. *Kershaw*, for a valuable consideration, and is now in the hands of his trustees, the bona fide holders, who directed this suit to be commenced against the defendant. After the assignment of this bond to Col. *Kershaw*, and long before the commencement of this action, *William Ancrum*, who held several of *Kershaw's* bonds, and more than the

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*amount of the one on which this suit is founded, assigned them over to the defendant, Lithgow, for a valuable consideration. So that the real question was, whether Kershaw's bond in the hands of Lithgow, the assignee, can be set off and discounted against his, Lithgow's bond, in the hands of Kershaw's trustees in the present action, or not?*

The cause was tried at *Camden*, before BURKE, J. who was of opinion, that the bonds in the hands of the defendant, could be legally set off in the present action, and directed the jury to that effect, who found a verdict accordingly.

The present, therefore, was a motion for a new trial, on the ground of *misdirection* in the judge.

*Pinckney and Ford*, for the motion.

*Pringle*, contra.

In support of the motion it was generally contended, that under our *discount law* these bonds could not be set off; because *not between the same parties*. That a man could not give in evidence the *right of another*. That an assignee could not sue *in his own name*; and if he could not *maintain suit*, he could not give it in evidence *by way of discount*. It was next urged, that our discount law followed the principles of the *British act of parliament* relative to mutual debts, and ought to have the same construction. And lastly, that no judgment could be entered up under our discount law, in case the verdict should stand for the overplus, or sum which the bonds in the defendant's hands exceeded that due on the bond on which this action was founded.

For the defendant, it was replied, that there was a great difference between the *British act of parliament* relative to setting off mutual debts, and our discount law of 1759. That in the one case, the matters and things pleaded, must

be between the same parties, and presupposed mutual dealing between them. Whereas our discount law was upon a much broader basis, and embraced a variety of transactions which were never contemplated by that act; and expressly declares, that "any account, reckoning, demand, *cause, matter, or thing*, which the defendant has "in his *own right*, shall and may be given in evidence, by "way of discount, against the plaintiff's demand." That these terms were the most comprehensive the mind could well form an idea of, and included all claims of whatever nature which a man had or could have, either originally with the plaintiff himself, or by assignment or transfer from any third person. All that the law required was, that the right should be in the defendant. It was perfectly immaterial how it accrued to him. That the assignment of a bond transferred the *right* from the *obligee* to the *assignee*, and from that moment the right became vested in the assignee only, (1 *Durn. & East*, 619. 621. 4 *Do.* 340.) so much so, that no payment to the obligee, after notice of the assignment, was good; and if the obligor should pay it after such notice, he must pay it over again to the assignee. This, therefore, proved, that the right was as much in the assignee as if the bond had originally been made payable to him; and if so, then it came both under the letter and spirit of our discount law. That with regard to the entering of judgment for the balance due the defendant, it was extremely questionable how far the act would warrant any such entry. That it was expressly against the principles of the common law; and that all the defendant wished in the present case, was a confirmation of the verdict, by which he should be for ever released from the demand of the plaintiff.

*Per tot. Cur.* By the assignment of a bond, a beneficiary interest passes to the assignee; and from that moment he becomes not only entitled to the paper and the wax, (as the old law terms it,) but also to the money mentioned in it. No payment to, or release from, the obligee, will dis-

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charge the obligor, after notice. He must pay it to the assignee only. The *right* to the money, which is the *essence of the thing*, passed by the assignment, is as completely vested in the assignee, as if the contract was originally made with him, and the bond and assignment are only the evidences of this right. This kind of right comes *literally* under the words of our discount law, which is much more extensive and comprehensive than the *British* act respecting mutual debts. Indeed, justice and policy both require that a liberal construction should be given to this act, in cases similar to the present: otherwise, persons in insolvent circumstances, might recover their demands against those in good circumstances, while the solvent one would remain remediless. A discount, therefore, is the fairest way of doing justice to all parties.

*The Court* declined giving an opinion respecting the propriety of entering up a judgment in favour of the defendant, for the surplus of the bonds in his hands, as it appeared extremely doubtful whether the act would warrant it, notwithstanding a practice to the contrary.

Judgment for defendant.



January  
Term.

GODDARD against LUBY.

All disputes  
between  
*French* citi-  
zens, must be  
determined  
by the *French*  
consul.

CASE for slanderous words. On motion made, a nonsuit was ordered by the court, as the parties, plaintiff and defendant, were *French citizens*.

By the 12th article of the convention between *France* and *America*, for defining the functions of consuls, &c. it is declared, "That all disputes between the subjects of his most Christian Majesty in the *United States*, or between the citizens of the *United States* within the dominions of the

“most Christian King, &c. shall be determined by their  
 “respective consuls and vice-consuls, either by reference  
 “to arbitrators, or by a summary judgment without costs.”  
 Under the construction of this article,

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*The Court* (present, GRIMKE and WATIES, Justices)  
 referred the parties to the *French* consul for redress.

JOHNSTON *against* The CORPORATION OF CHARLESTON.


January  
 Term.

THIS was a rule obtained to shew cause why a *mandamus* should not issue to the corporation of *Charleston*, to restore the plaintiff, who had been displaced as a warden of the city. It appeared that *Johnston* had been returned a warden of the city, and had been sworn in and taken his seat at the city council board; but that a scrutiny was afterwards demanded by his antagonist at the election; and upon such scrutiny, it appeared that several votes had been given by persons not entitled to vote—which votes the city council had directed should be taken from the candidate who had the highest number of votes, which being done, it left it dubious which had the greatest number of good votes: upon which it was proposed in the council, to swear the voters, or to compel them, individually, to declare for whom they voted. This, however, was overruled in the council, and the election was declared void, and a new one for the ward was directed; when Mr. *Purcell* was returned duly elected in the room of the plaintiff.

The city corporation have a right to scrutinize into the elections of its members; but have no power to swear persons in order to ascertain for which candidate the bad votes were given.

The application for a *mandamus* to restore the plaintiff to his seat, was on these grounds: First, that the city council had no right to scrutinize into the election of a warden; for that the return of the managers was final. Secondly,

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 Charleston.

that if they had the right, they ought to have called upon the voters to declare upon oath, for whom they individually voted, in order that it might have been ascertained which of the candidates had the greatest number of good votes. And, thirdly, that even supposing the election had been obtained by improper votes ; yet, as the present applicant had been received as a member, and had taken the oath of office, this was such a recognition of his right, that the city council could not afterwards displace him.

*The Court, (all the Judges present,)* after hearing counsel, were unanimously of opinion, that the city council, in the first instance, had the power of scrutinizing into the election of their members, and that this right was incident to all elective bodies. But that if they abused their power, or did injustice, then this court would interfere, and see that justice was done. That with respect to their swearing the voters, or compelling them to declare for whom they gave their votes, it was a kind of inquisitorial power unknown to the principles of our government and constitution, and might be highly injurious to the suffrages of a free people, as well as tending to create cabals and disturbances between contending parties in popular elections. As to the mode adopted by the council in deducting the bad votes from the highest candidate, it was perhaps the best general rule that could be adopted : for if after such deduction, he had still a majority, then his election would stand unimpeached ; but if after the deduction, the next candidate had an equal or greater number of votes than the other, so as to make it a doubtful case which of them really and truly had the greatest number of unquestionable votes ; then, according to the principles of a free government and the rights of the people, it ought to be sent back to the people at large to determine finally on the point. That as to his being sworn, it could not alter the case ; for if he was not duly elected, he ought not to have taken his seat ; and the mere act of being

sworn in, which was founded on a supposed right, did not give him a real one, which must have depended on the choice of the people of the ward.

Rule discharged.

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The Corporation of  
Charleston.

SMITH *against* The SHERIFF OF CHARLESTON  
DISTRICT.

January  
Term.

UPON a motion for the sheriff to restore sundry negro slaves who had been seized as the property of *Barnard Beekman*, at the suit of *Arthur Bardeleben*.

*Pinckney* stated, that the plaintiff, *Smith*, was the guardian of *Charles Beekman*, the son of *Barnard Beekman*, and owner of the house and lot occupied by his father; and that the negroes in question had been seized and sold for house-rent due by the father in 1793; at which sale, the plaintiff, *Smith*, was a fair and *bona fide* purchaser. He admitted that there had been an execution lodged in the sheriff's office previous to the seizure against *Barnard Beekman*, at the suit of *Bardeleben*. But he contended in support of the motion, that under the *statute of Anne*, where levies are made on premises where rent is in arrear, that the sheriff is bound to pay one year's rent; and that the negroes in question were not more than the value of a year's rent, which was estimated at 130*l.* and the negroes sold only for 127*l.*

*Rutledge*, *Pringle* and *Desaussure*, were for the defendant, and contended, that as no rent or *specific sum* had been reserved, either by deed, writing, or parol, there could be no distress. For in order to authorise a distress, a *sum certain* must be reserved and made payable, either by deed, some instrument of writing signed by the party chargeable, or by some parol agreement. And that as no deed or agreement was alleged or proved in this case, none

No distress can be made for rent, unless some *specific sum* be reserved in a deed, or by parol, &c. though *assumpsit* will lie for use and occupation, &c.

The bare recital in a bill of sale made in pursuance of a distress, is no proof of the existence of lease, &c. vide *Smith v. Jacks*, ante.

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could be presumed ; that as none could either be presumed or proved, there could be no distress legally made ; and if no distress could be made, then there could be no legal sale, or title in the present plaintiff. That even supposing rent really due, the sum was uncertain : *the quantum was matter of fact proper for a jury* ; and until that was ascertained, it could never be known to what extent the tenant was chargeable. That the *statute of Anne* expressly relates to a year's rent reserved *by lease*, and did not extend to unascertained sums for the *use and occupation*. They relied on 2 *Bac.* 107. *Id.* 359. *Wood's Inst.* 385. *Stat. Ann.* *Smith v. Jacks, ante.* They also insisted that by the lodging of the execution at the suit of *Bardeleben*, which was prior to the seizure for rent, the property was divested out of *Barnard Beekman*, and transferred to the sheriff ; and that the negroes being accidentally on the premises afterwards, did not make them liable for rent. *Bull v. Horlbeck, ante.*

*Pinckney*, in reply, compared the rent due on this occasion to a *rent-charge*, which he said was very different from rent reserved on a lease, and this, he contended, would warrant the distress and sale, although there was no lease. Besides, said he, the sheriff's bill of sale (that is, the city sheriff's, for he made the distress and sale of the negroes) states, that the distress was for one year's rent, 130*l.* due previous to the sale, which he compared to an agreement, or voucher, that the 130*l.* had been the specific sum reserved for one year's rent.

*By the Court*, unanimously, (all the judges present.) No distress for rent can be made, unless a specific sum be reserved, either by some *lease, deed, agreement in writing*, or by *parol*, though *assumpsit* will lie for the use and occupation ; in which case, the *quantum*, or sum, must be found by a jury. This point has been determined in the case of *Smith v. Jacks, ante.* And as it does not appear, in this case, that any sum has been reserved by *deed* or by *parol*, the distress was irregular, and being irregular, all the proceedings under it were void, and consequently no title could



be derived from it. This cannot be compared to a *rent-charge*, which is generally an annuity issuing out of lands, with a clause of distress for non-payment. And it is called a rent-charge because the lands are charged with distress by the express grant or provision of the parties, (4 Bac. 336.) which by no means appears in the present case. And as to the recital in the bill of sale made by the city sheriff, it is no proof whatever of the existence of a lease, or of any agreement by which this sum of 130*l.* was reserved.

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Motion discharged.

The Executors of RIPPON *against* The Executors of  
 TOWNSEND.

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THE point submitted to the court in this case was, whether notes of hand are on a footing with bonds, and to be paid in average and proportion with them, in case of the insolvency of an estate. It turned upon the construction of the twenty-sixth clause of the *executor's law*, passed in 1789, which enacts, "that debts due by any testator or intestate shall be paid in the following order, to wit :—  
 " first, funeral and other expenses of the last sickness ; charges of  
 " the will or administration ; next, debts due to the public ;  
 " next, judgments, mortgages, and executions, the oldest  
 " first ; then, *bonds or other obligations* ; and lastly, debts  
 " due upon open accounts," &c.

Notes of hand are not, by the act of 1789, on a footing with bonds, but must be paid in the order prescribed for them by the common law, where an estate is insolvent. Vide *The Executors of Harbison v. The Administrator of Giles*, ante

On the one hand it was contended, that the legislature meant to class bonds and notes together, and to put them all on the same footing, and to include them all under the term "*obligations* ;" and the more especially as *notes of hand* are no where mentioned in the clause, though *open accounts* are ; and that wherever the sense of the legislature could be collected, it was the duty of the court to give

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such a construction to the act as was most conformable to such intention.

On the other hand it was urged, that no such intention was apparent in the act ; and although the clause is silent about notes of hand, yet they must still remain where they were at common law, and must be ranked with other promises and assumptions. That the word "*obligation*" was a term well known at law to be a deed under seal, which constituted a specialty ; and this kind of deed or instrument always had, from time immemorial, a preference to *assumpsits*. That it was a maxim, wherever a term is made use of in a statute, it shall receive such a construction as it was known to have at common law ; 6 *Mod.* 143. and that the court was bound to give it this construction, and could not, by implication or intendment, suppose that the contrary was the real intention of the legislature.

After hearing the arguments of counsel on both sides, the CHIEF JUSTICE delivered the opinion of the court in the words following :

The question in this case is, whether, on a deficiency of assets, *promissory notes*, given since the executor's act of *March*, 1789, are to be paid in average and proportion with *bonds* given since that period ? And, on mature consideration, we are of opinion that notes now hold only the *same rank which they did before the act passed*.

It has been contended that the legislature meant to place them on a footing with bonds, and a conversation has been mentioned, which passed between the members of the house of representatives who brought in the bill ; but the court can pay no regard to this information—it must not weigh with us in our judicial capacities ; the act must be construed by what is found in the act itself, and not by any thing extraneous. There is nothing in the act which indicates such was the intention of the legislature. If, indeed, at the time of passing the act, nothing but a bond was called an obligation, from the necessity of giving efficacy to the word *obligations*, which otherwise would be an expression

without meaning, we might have been inclined to say that the legislature meant, by that word, any writing signed by the party acknowledging the debt, although such writing was not sealed. But the word *obligation* is a technical term, which, in its legal and proper meaning, signifies a *contract under seal*. Penal bills, a covenant, a charter-party, an indenture, are obligations; there is, therefore, no necessity to construe a note to mean an obligation, in order to make sense of this act. The words "*bonds or other obligations*" may well read thus—*bonds or other contracts under seal*. If we once admit of suppositions, we may suppose any thing; and one judge may suppose one thing, and another judge another thing. We have no rule to govern us, but, construing the act according to the legal and technical meaning, we stand upon firm ground.

It was, some time ago, determined by this court under the county court act, which declares that "notes should constitute specialty," that they were made specialty only for the purpose of bringing an action of debt upon them in the county courts, so that you might join notes, bonds, and contracts, under seal, in one action of debt in the county courts; and I believe no attorney has ever thought of doing so, or of bringing an action of debt on a promissory note, in this court.

To shew that the legislature did not mean to make them specialty for the purpose of being paid on a deficiency of assets, in average with bonds, let us refer to the act respecting bills of exchange. That act declares that in such case *foreign bills*, which are protested, shall be on a footing with bonds. Now, if the county court act had made bills and notes specialty, for the purpose of putting them on a footing with bonds, there would have been no occasion for the latter act; and even that act does not, in this respect, affect any but *foreign bills*—it leaves other bills, as well as promissory notes, on the same footing as they were before.

Let us consider what the law was before the act, with respect to the order and rank of the debts of a deceased person. By the common law, debts ranked in the following

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order : 1. Debts on record. 2. Debts by specialty. 3. Debts without. The executor's law of 1745, made no alteration in the common law, except that persons who obtained administration as principal creditors, should not prefer one creditor to another, in equal degree. Before that act, a preference might be given. But with respect to the order of debts, it stood always in this country on the common law, and did not depend on any act of assembly. What has this act of 1789 done? It seems to have been the object of that act to bring and take into one view, all the laws with respect to wills, the duty of executors, and the distribution of assets. Accordingly, it re-enacts the law taken from the statute of frauds, which declares the requisites of a will ; it shews the order in which debts are to be paid, mostly as they were before the act, and with very little alteration ; charges of the last sickness are indeed put on a footing with funeral charges ; and recapitulates the several kinds of debts. It does not mention the words *promissory notes* ; and from that circumstance it has been argued, that if notes do not come under the word *obligations*, they are left unprovided for, and therefore are not to be paid at all. But this consequence does not follow ; for as they are not excluded by the act, they hold the same right and rank which they did before. It is of great consequence to every free country, that the laws should be fixed and settled ; and that when they are so, and generally known and understood, that they should not be changed by implication, or otherwise than by a clear, express and positive declaration of the will of the legislature. It has been the established law of this country, ever since the first settlement of it, that *bonds* should be paid *before notes* ; and this law is so generally known, that I suppose you would not find one man in a hundred (I speak of men of business) who is ignorant of it. Many good reasons may be given why bonds should have preference of notes. However, as they are proper for the consideration of the legislature, I shall not state them here. If the legislature shall think fit to alter the law, it is to be hoped they will do so clearly and

explicitly. In the mean time, it would be wrong for us to give different meaning than the law affixes to a legal technical term, it not being necessary to do so; and this merely from an idea that the legislature meant to do so, which perhaps they did not, though some particular member might have had such an intention. As this is a question of much importance, I have stated thus fully the reasons upon which our opinions are founded.

Present, RUTLEDGE, Ch. J. BURKE, GRIMKE, WATIES,  
and BAY, Justices.

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The Executors of LYNCH against The Executors of  
INGLIS.

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THIS was an action of debt upon a bond. On the adjournment day of this term, the defendants obtained a rule to shew cause why the judgment entered up by the plaintiffs should not be set aside, and they, the defendants, have leave to plead *plene administravit*. It appeared that the plaintiffs commenced their action for *September* return, 1790, against *Inglis*, in his life-time; filed their declaration, and served the rule to plead on the 28th of *January*, 1791, and obtained an order for judgment on the 11th of *March*, 1791, in default. *Inglis* died the 31st of *March*, 1791, and the plaintiffs entered up their final judgment the 28th of *July*, 1791, four months after *Inglis's* death. Afterwards, the plaintiffs issued a *seire facias*; but before a judgment was entered up on the *seire facias*, notice was given to the plaintiffs' attorney in the original action, that the defendants would plead *plene administravit præter*; of which the plaintiffs' attorney took no notice. This motion was, therefore, made to set aside the first judgment as

If a defendant die after order for judgment on a bond, final judgment may be entered up on it at any time within two terms afterwards.

*Plene administravit* cannot be pleaded by executors to a *seire facias* issued against them.

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irregularly obtained ; and if not, that the defendants might have leave to plead *plene administravit* to the *scire facias*. This naturally brought two questions before the court : First, Whether the first judgment entered up after *Inglis's* death, was regular or not ? And secondly, Whether *plene administravit* can be pleaded to a *scire facias* on a judgment against executors, and the debt placed in the order of specialties ?

Gillb. Hist. Com. Pl. 106.  
 Stat. Wm. III. c. 10. Salk. 42.

*Pinckney*, in support of the motion, contended, that by the common law the action abated by the death of the defendant. If not, that a *scire facias* ought to have issued to the executors to shew cause why final judgment should not be entered up. He admitted that by the stat. 17 *Charles II.* c. 18. (in force in this state,) if a defendant die *after verdict*, the plaintiff might enter up his judgment within two terms after ; but then this act only extended to *verdicts*. By stat. 8 and 9 *Wm. III.\** c. 11. s. 11. (not in force here,) if the defendant die after interlocutory judgment, the action shall not abate, but a *scire facias* may go against the executors to shew cause why damages should not be assessed, &c. That the order for judgment on the back of the declaration, was analogous to an interlocutory judgment, and, under the rules of court, might have been set aside, on payment of costs, *pleading an issuable plea*, and coming to trial *instantly* : therefore, all the rules of law, and adjudged cases applicable to the one, would, with equal force, apply to the other. He contended, that although this last act of parliament was not in force here ; yet it had been adopted by the rules and the practice of our courts, and thereby became as much a law as if it had been formally extended and made of force here. On the second ground he also contended, that the plea of *plene administravit* was *tantamount to the general issue* ; and if it was regular to set aside an order for judgment, and plead

1 Morg. 409.  
 1 Barnes, 161.  
 166. 168. 294.

1 Barnes, 195.  
 , Ibid. 294.

\* Although this is not made of force by A. A. No. 331. which declares a number of *British* statutes in force ; yet the 6th and 7th sections are copied verbatim into A. A. No. , and into the county court act of 1785.

an issuable plea, it was not now too late to plead a plea of *plene administravit*.

*Pringle*, contra. There is a material distinction between *interlocutory* and *final* judgments. Interlocutory, are those given in the middle of a cause for some default, and which are not conclusive against the party. But final, are those given at the end of a cause, where nothing further can be said against it, and therefore conclusive against the party. As for instance, in all cases sounding in damages, the interlocutory judgment only gives the party a right to recover; but there can be no recovery until the *quantum* or sum be ascertained by a jury, then it becomes certain and fixed. Whereas, in all actions of debt, the very sum is fixed and exactly ascertained. There the party shall recover *in numero*, neither more nor less than what is mentioned in the deed. It is *tantamount to a verdict*. It is reduced to as great a certainty by the deed itself, as it could possibly be by the verdict of twelve men. Therefore, it would be unnecessary and superfluous to send it to a jury, when it is as certain as the nature of the case can admit of. By the stat. 17 Charles II. c. 8. if the defendant should die after verdict, the plaintiff may enter up judgment at any time within two terms after. Why? Because the demand is rendered certain by the verdict of the jury. Certainty then, being the grand essential requisite of the law in such cases, where can be the difference between the verdict of a jury *ascertaining* it, and the terms of a deed *declaring* it? There surely can be none. For all these reasons it is clear law, that whenever a matter sounds in *damages*, the interlocutory judgment is not final; but when it is for a *liquidated* sum, in such case it is final; and the suit no more abates by the death of the party, than it would in cases of verdicts. (To this point he relied on 1 *Crompt.* 279. 2 *Raym.* 766. 849. *Str.* 892. 1 *Barnes*, 267. 3 *P. Wms.* 399. *Salk.* 401. From all which he concluded by observing, that as the plaintiffs had entered their judgment within two terms after the defendant's death, it could not now be impeached.) With regard to the second point,

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3 Black. Com  
596, 597.

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whether the defendants can now plead *plene administravit*, it is certainly too late ; for nothing shall be pleaded to a *scire facias* which could have been pleaded in the original suit ; and the executors cannot now be placed in a better situation than their testator was in his life-time. Besides, the judgment upon a *scire facias* is *de bonis testatoris*, and can by no means injure executors. The allowing this kind of plea at this stage, would be to deprive the plaintiffs of the *priority they have by their judgment*, and would be levelling down a judgment to the footing of a specialty, and to be paid in average and proportion ; when, by the clear and known rules of law, the judgment had a lien on the whole of the testator's *real estate*. *Salk. 615. 11 Vin. 279. Statute of Frauds, &c.*

All the judges were present at this argument ; and as the case was of considerable importance to the practice of the court, they took time to consider, and, after consultation, were all of opinion that the judgment entered up, within two terms after the death of *Inglis*, the original defendant, was regular, and could not be set aside. Upon the second ground, they were also of opinion that nothing could be pleaded to a *scire facias* which might have been pleaded to the original action. As the judgment, in this case, was against a testator, in his life-time, his executors could not be placed in a better situation than he was before his death. Nothing could be pleaded by them excepting a release, or some matter arising since the entering up of the judgment.



DOTT and others against CUNNINGTON.

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Term.

THIS case came before the court on a special verdict, which stated, that "*Sarah Baker*, by deed-poll, gave her daughter, *Sarah Dott*, (wife of *David Dott*,) sundry negroes, &c. distinct from her husband during her life, and "*at her death, to the heirs of her body.*"

The verdict further states, "that *Mrs. Dott* then had issue, the plaintiff, her eldest son, and several other children, and soon after her husband, *David Dott*, died; and that she afterwards married *John Fyffe*; and that, after the marriage, the said *Fyffe* and his wife, viz. in 1776, sold part of the negroes in question to the defendant, *Cunnington*." It then submits the point of law to the court, whether *Mrs. Dott* had a life estate only in the negroes, with a limitation over to the children on her death, or whether the whole vested in her as first taken?

In a deed made to one for life, and "*at her death to the heirs of her body,*" where there are no other words ingrafted on them to shew they were a *descriptio personæ*, or explanatory of the party's intention, these words shall be deemed words of limitation, and not of purchase; consequently, being too remote for personal property, the whole shall vest in the first taker.

The case was very fully argued on two different days, after which the court (present, RUTLEDGE, Ch. J. BURKE, GRIMKE, WATIES, and BAY, Justices) took time to consider, and upon consultation, were unanimously of opinion that the words "*at her death, to the heirs of her body,*" in the present case, were words of limitation, and not words of purchase. For although, in some cases, they may be construed to be words of purchase, and not of limitation, yet, in this deed there were no words which the court could lay hold of to give such a construction. They must be governed by the plain rules of law, and the legal import of the phrases which constitute an estate tail; which being too remote, and tending to a perpetuity of chattel, the whole vested in *Mrs. Dott*, the first taker. Therefore, let the *postea* be delivered to the defendant.

N. B. As this was looked upon to be a leading case, I subjoin the authorities, and some of the reasons, which in-

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duced the court to be so decidedly of the above opinion, in the construction of this deed.

The authorities in the books in which these words "*heirs of the body*" have been construed words of *purchase*, turn mostly upon the manifest intention of the party, appearing either from the *words of the deeds or wills themselves*, or from the *nature and design* of them. First. In all cases which turn upon the construction of *marriage articles*, in which it is evident that a provision for the *issue of the intended marriage* is the *design* of the parties to the deed, the court will consider the *issue of such marriage* as *purchasers*, notwithstanding the generality of the expression "*to the heirs of the body*;" as in the case of *Bale v. Coleman*, 1 P. Wms. 145. and the case of *Seale v. Seale*, *ibid.* 291. where Lord Chancellor *Harcourt*, treating of marriage articles, says, "that in the nature and design of them the issue are particularly considered, and looked upon as purchasers;" and for these reasons, says he, courts have always restrained the generality of them for the benefit of children.

2. In all cases of *devises for the benefit of children*, these words shall be construed words of *purchase*; as in *Champion v. Picax*, 1 Atk. 472. which was a devise to one during life, without control of her husband; and after her death for the benefit of her *issue*. The testator here having in contemplation the marriage of his grand-daughter, and a provision for children, the same construction was given by Lord *Hardwicke*, that the children should take by purchase. So, also, in *Fearne*, 381. it is laid down, that wherever the comfortable *provision of a family* is in contemplation of the parties, in every such case, the court will put this *equitable construction* on the words "*heirs of the body*," and consider children as purchasers, for the purpose of defeating an estate tail, (which admits of no divisibility,) and making an equitable distribution among the children.

3. There are also many cases, again, in the books, where the words "*heirs of the body*" are construed words of *purchase*, where no marriage is in contemplation of the parties, nor provision for children. And these are where it is evi-

dent and apparent on the face of the deed or will itself, notwithstanding these words are made use of, that the party meant and intended an equal distribution ; as where an estate is given to one for life, and after, to the heirs of his body, *share and share alike*. Here the words "*share and share alike*," being added to these words, qualify the generality of the words "*heirs of the body*," and shew it was the intention of the party to make an equal distribution.

Another general rule is, wherever there are words ingrafted upon, or superadded to the words "*heirs of the body, or issue*," which amount to a *descriptio personæ*, or which point out the particular person or persons who the party meant should take. In these cases also, those persons, in law, shall be considered as purchasers ; as if a gift or devise be to one for life, and then to the *heirs of his body living at the time of his death*. Here the surviving child or children shall take by *purchase*, because the words "*living at the time of his death*" are sufficiently descriptive of those he meant should take, to wit, the children alive at the death of him who had the life estate. So, likewise, a devise made to *I. S.* and to his *eldest issue male*, he having *no son at the time* ; this shall be taken as a sufficient *descriptio personæ*, to wit, that the eldest son of *I. S.* should take. *Pow. on Dev.* 359. A devise, therefore, may well be described by the word *heir* or *issue* of one who takes a previous estate, if the testator plainly shews that the term *heir* or *issue* was meant or understood as a *descriptio personæ*. *Ibid.* 358. 372. 1 *Eq. Ca. Abr.* 184.

The foregoing cases, therefore, and those similar to them, are the cases in which the words "*heirs of the body*," or "*issue*," shall be construed words of purchase, and not words of limitation. But no such construction is given to wills or deeds, where no such *settlement* or *provision for children* is in contemplation, or where it is not evident on the face of the will or deed that the party meant *an equitable distribution of his estate* ; or where the persons were not *sufficiently pointed out*, who were the *intended objects of the party's bounty*. In every other case the deed or will must

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be governed by the rules of law, and the *intent* of the party must be collected from the plain and obvious *meaning* and *import* of the *legal phrases themselves*, if the terms are sufficiently explicit to govern the construction. Lord *Kenyon*, in 3 *Durn. & East.* 472, 473. lays it down as a rule, that in deeds (and wills) certain legal phrases must be made use of to create estates—as the word “*heirs*” to create a *fee*, and the words “*heirs of the body*” to create an *estate tail*; beyond which (he says) there is no magic in particular words, further than they shew the intent of the parties. It is also laid down in 1 *P. Wms.* 143, 144. that it is a plain rule of law, that if an estate be limited to one for life, with remainder to the “*heirs of the body*,” this is an *estate tail executed*. Let the deed in question be compared with these rules. Mrs. *Baker*, by this instrument, gave the negroes mentioned in it to her daughter, Mrs. *Dott*, during life, and at her death to the “*heirs of her body*.” There are no other or further words in the deed *explanatory of her intention*, or which could bring this case under any of the general heads above mentioned, in which children are considered as purchasers. What is then the plain and obvious construction of law upon the words of this deed? The answer is plain, that the estate being given to Mrs. *Dott* for life, with remainder over to the *heirs of her body*, makes it an *estate tail executed*; which, being of a *chattel interest*, is too remote. The whole vested in Mrs. *Dott*, the first taker; consequently, being her property, the second husband acquired a right to it by marriage; therefore the sale to the defendant, *Gunnington*, was good and valid in law.

It cannot be denied, however, that in many cases, personal chattels or terms for years, may be limited over, either by executory devises or deeds, as effectually as real estates, if it is not attempted to render them unalienable beyond the duration of lives, or twenty-one years after. *Harg. Co. Lit.* 20. But the vesting an interest in a chattel, which in reality would be an estate tail, bars the issue, and makes all subsequent limitations void—the whole property, in such cases, vests in the first taker; and the reason which the law

gives is, that *it abhors perpetuities*. *Harg. Co. Lit.* 20. 4 *Bac.* 294. 2 *Vern.* 349. 600.

The principal authorities quoted on this occasion were *Fearne*, 342, 343. *Ibid.* 346, 347. 1 *P. Wms.* 290. &c.

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DOTT and others *against* WILLSON.

January  
Term.

THIS was another case brought forward by the same parties as in the foregoing case ; but the special verdict was founded on Mrs. *Baker's will*, made several years after the deed of gift.

This verdict found, that "*Sarah Baker*, by her will, bequeathed one-fourth part of her estate (consisting of negroes, household furniture, &c.) to her daughter, *Sarah Dott*, during her life, (without the control of her husband,) and at her death, to the *heirs of her body*, and *their heirs and assigns for ever* ; but if she should leave no issue, then to be disposed of as she should think proper."

In this case, the court were unanimously of opinion, that the operation of law was very different from what it was in the foregoing case against *Cunnington* ; and that in this will there were words sufficiently explanatory of the testatrix's intention, so as to qualify the generality of the words "*heirs of the body*," and to make her grandchildren take as purchasers. That she did not mean or intend a perpetuity, is obvious from her adding immediately after the words *heirs of her body*, "*and their heirs and assigns for ever*." That although the first words *heirs of her body*, unqualified and alone, would have made an *estate tail* ; yet, the words superadded or ingrafted on them, make a *joint-tenancy*, which are tantamount to *share and share alike*, and evidently shews she intended an equal distribution of the property among her grandchildren after her daughter's death. That wills have a

If one devise chattels to another for life, and at her death, to the heirs of her body, and their heirs and assigns for ever ; here the latter words shall restrain the generality of the estate tail, and make it a joint-tenancy ; so that children shall take as purchasers.

Leaving no issue at her death, shall be construed a good description of persons.

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v.  
Willson.

more liberal construction than deeds, and that it was the duty of the judges, wherever they could collect the intent and meaning of the testator or testatrix, from the will, to give it such a construction as was most evidently consonant to the intent and design of making it. That, at any rate, if there was any doubt upon the first clause of the will, yet the proviso shews very plainly her intention, viz. "*But if she should leave no issue, then to be disposed of as she should think proper.*" The leaving *no issue*, here, may very properly be construed into *leaving no children at the time of her death*, which are a sufficient description of those she meant should take upon the death of her daughter—to wit, whatever children she might have at the time of her death.

The postea was delivered to the plaintiffs.



January  
Term.

DELESINE against GREENLAND.

Where a man agrees to submit a matter in dispute, to the oath of a third person, and the oath is made accordingly, he shall be held to his agreement.

CASE for a cask of indigo. The defendant admitted that the indigo came into his possession; but contended that it had been returned to Mr. *Frank Allston*, for account of, or by order of the plaintiff; which Mr. *Allston* denied. That the defendant then proposed that if *Allston* would take his oath that he never received it back, he would pay for it. *Allston* accordingly went and made the oath; but the defendant refused to be bound by his agreement, and offered to go into testimony respecting the indigo.

*Pinckney* objected to this as being irregular; and he contended, that as the defendant had agreed to leave the matter in dispute to *Allston's* oath, he was bound by it, and could not go into any other testimony; and relied upon a case in 2 *Esp. Rep.* 178. where Lord *Kenyon* held a man to such a kind of agreement, and refused to let in any other evidence.

*Trezevant* urged for liberty to give other evidence ; but

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*The Court*, on the authority of the case in *Espinasse*, refused it ; and said it was proper that the defendant should be bound by his agreement ; for it might be attended with bad consequences to permit a party to fly off from an agreement of this nature, after he had heard what had been sworn to by a witness or witnesses of the opposite party.

Delesline  
v.  
Greenland.

Verdict for plaintiff.

Defendant's attorney gave notice of a motion for a new trial, and this case was argued in the constitutional court of appeals before all the judges, when the motion for a new trial was overruled, and the verdict confirmed.



LESESNE *against* RUSSELL and others.

January  
Term.

IN this case a motion was made to set aside the return of the commissioners, for having awarded to the plaintiff, a widow, an extravagant sum in lieu of her dower.

*Ward*, on behalf of the creditors, objected to the return of the commissioners, because, as he alleged, they had allowed the widow much more than, by any known rule of valuation, or any principle of justice, she was entitled to. That as the land could not be conveniently divided, they had in fact allowed her as much as it was really *worth in fee*, and indeed *more* than it had since sold for at the sheriff's sale.

*Read*, contra, contended, that the act of assembly had vested this power of assessment *absolutely* and unconditionally in the commissioners, and that the court had no control over them, *unless they had proceeded upon erroneous princi-*

Where commissioners appointed to award a widow a sum in lieu of dower, are guilty of no mal practices, or do not proceed upon erroneous principles, their return is *conclusive* ; although the sum awarded may appear large, &c.

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Lesesne  
v.  
Russell.

*ples*, (as they did in the case of *Scott v. Scott*,\*) or were guilty of *mal practices*. In these cases he admitted the court had a control over them; but in every other case, their award was final and conclusive. Besides, the lands might be worth a great deal more than they would sell for at a sheriff's sale when cash was scarce; and under such circumstances, the court could not well interfere with the widow's claim of dower, and make the sheriff's sale the rule of valuation.

*The Court* (present, RUTLEDGE, Ch. J. GRIMKE, WATIES, and BAY, Justices) were unanimously of opinion, that the act of assembly gave the power of assessing a sum of money in lieu of dower exclusively to the commissioners, two of whom were appointed by the creditors, two by the widow, and the fifth by the court; and that they had no more power to interfere with them, unless they were guilty of *mal practices*, or had proceeded upon erroneous principles, than they had to interfere with arbitrators, who were not guilty of misbehaviour, or who had not proceeded upon some mistake.

It was therefore ordered, that the return of the commissioners should be received and confirmed.

\* *Postea*, in the Appendix.



The Administrator of M'TEER against SHEPPARD.

Beaufort  
District,  
April Court.

TROVER for two negroes. The bill of sale from the defendant to *M'Teer*, was admitted.

*Holmes* then stated to the court, that these negroes had been conveyed to *M'Teer*, in his life-time, to cover them from a suit in chancery, which Col. *M'Pherson* was about to institute against him. That no consideration was paid, and it was in nature of a trust, in order to screen the property against *M'Pherson's* claim, and offered to call a witness to prove this trust ; when

Parol testimony is not admissible to vary a deed, so as to make that a trust, which appears to be an absolute conveyance. After, where creditors are concerned.

*Lee*, for the plaintiff, opposed the introduction of testimony to prove a trust against the face of a deed, which appeared to be absolute and unconditional.

BAY, J. was of opinion, that parol testimony was not admissible in this case, as it went substantially to alter or vary a deed under seal, so as to make that a trust which appeared to be absolute. Though, if creditors or third persons were concerned, as to them, it might be admitted to prove a fraud. But in the present instance, the party must not be permitted to aver it against his own deed.

*Holmes* then pressed for a nonsuit, as no demand was proved before the suit was commenced, and it was not pretended that there was a tortious taking.

Nonsuit ordered accordingly, on the ground that no demand was made of the negroes before the commencement of the action.

Orangeburgh  
District,  
April Court.

The ORDINARY of ORANGEBURGH DISTRICT *against*  
PHILLPOT and others.

In an action of debt on an administration bond, a general averment that the administrator did not pay off debts according to law, is good. Plaintiff is not obliged to assign every specific breach; but the defendant is bound to shew how he disposed of every part of the effects, &c. as the inventory charges him, and he is bound by law to discharge himself, by rendering in an account to the ordinary.

THIS was an action of debt against the defendants, as securities to an *administration bond*; *plea, performance of condition*; *replication*, that the administrator had not *duly administered* according to law, nor had he rendered in an *account of* his administration into the secretary's office, within the time mentioned in the condition of the bond.

*Holmes*, for the defendants, took an exception to this replication, as not being sufficiently particular as to the breaches; and contended, that the plaintiff ought to have set forth every particular piece of misconduct in the administrator, in wasting the effects of the deceased; otherwise, his administrator and securities could not at this day know how to defend themselves.

*Dickinson*, contra, argued, that the breaches were well assigned—to wit, his not paying off debts according to law, and not returning an account of his administration into the secretary's office, that the creditors might see how the effects of the deceased had been disposed of. That the inventory charged the administrator, and he was bound to discharge himself by his account and vouchers to the ordinary. That therefore, these general breaches were sufficient, without descending into particular items, which it was impossible for a creditor to do.

BAY, J. The breaches in this case are well and sufficiently assigned. The administration bond is taken in pursuance of the stat. 22 and 23 *Charles II.* for the better settling of intestates' estates, which is made of force in this state. Previous to this act, it was discretionary in the ordinaries whether they took them or not; but this law requires it as necessary in all cases, and prescribes the form. In 1745, the old *executor's law* (*Pub. Laws*, 201.) made several amendments of the stat. of *Charles*. It directed

that an inventory should be made in sixty days after qualification, and returned into the secretary's office in ninety days, with power, however, to the ordinary to give further time if necessary. This act expressly makes executors and administrators liable for the real value of the goods and chattels contained in the inventory, and with the value of the *credits* which, by *due diligence*, they could recover and receive. The thirteenth clause of the executor's law, in 1789, (*Pub. Laws*, 422.) enacts, that the appraisement shall be given in evidence against executors, to prove the value of the estate; but shall not be conclusive, if the estate shall sell for more or less than what is mentioned in the appraisement. Both these clauses, however, shew clearly that the inventory is sufficient to charge executors; and they are bound to exculpate themselves, by their accounts and vouchers, for the different items of the estate; consequently, a general assignment of a breach of duty is sufficient. The very import of the terms *to administer*, implies that justice will be done by the administrator, by payment of debts, &c. and he becomes, the moment he qualifies, a trustee for creditors, infants, and those entitled to a distributive share of the estate; and therefore is bound by law, at all times when called upon, to shew how he has disposed of the assets. If this was not the case, it would be impossible for children and strangers to shew how, and in what manner and in what instances, the estate has been wasted and squandered away. The obligation is, therefore, surely on the administrator.

*Holmes* gave notice of a motion in arrest of judgment; but never brought it forward.

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Ordinary of  
Orangeburgh  
District  
v.  
Phillpot and  
others.

*May Term.*LEGARE and Wife *against* ASHE and others,

The execution of a *third* will, is a revocation of *two* former wills, although the last will be lost or mislaid, in which case, *parol* evidence of its contents is admissible.

THIS was an issue from the court of equity, and tried before a special jury, upon an issue of *devisavit vel non*. Ann Berwick, the mother of the plaintiff's wife, by her will, made in 1786, devised the whole of her estate (after some small legacies) to the plaintiff and his wife. She afterwards purchased other property; and, in consequence of this, applied to her counsel, Mr. E. Rutledge, in 1790, to draw another will, for the purpose of giving this last acquired property also to the plaintiff and his wife, to whom she declared her intention was to give every thing she had. Mr. Rutledge drew this will, which was regularly executed. But afterwards, in 1793, Mrs. Berwick again applied to Mr. Rutledge to have a third will drawn, in order that she might make a still better provision for her daughter, the plaintiff's wife; who in all her wills was the principal object of the testatrix's bounty. Mr. Rutledge accordingly drew this third will, and she executed it in his presence, and in his office, and it was witnessed agreeable to the statute of frauds. At her death, the first and second wills only were found, and not cancelled. There was no evidence of what became of the last will. It was supposed to have been left by the testatrix at Mr. Rutledge's office; but after a full search, he had not been able to find it among his papers. There was no reason to believe that she had cancelled it: on the contrary, there was strong evidence, and a variety of circumstances concurred to shew her perfect satisfaction of the contents of it, and a constant intention that they should be carried into effect. Mr. Rutledge and two of his students, who witnessed the will, gave *parol* evidence of its contents. The question was, therefore, whether the evidence was sufficient in law, to revoke

the first and second wills, and establish the last, or not?  
After argument,

GRIMKE, J. was of opinion, and so directed the jury, that the last will not appearing, was strong evidence of its having been cancelled.

WATIES, J. The evidence offered affords a sufficient ground for the jury to find the last will. The non-production of it, is only a *prima facie* presumption that it was cancelled, and not a *legal* conclusion. The contrary may, and has been shewn, by *parol* evidence. The statute of *frauds* is not opposed to it. The evidence here, is not offered to dispense with that statute; but to supply the loss of a will, made conformable to it. Such evidence would be admissible even in the case of a *record* lost. If the will had been *designedly* destroyed, *parol* evidence would not be admissible, because it would be making a new will. But it appears here, that the will was either *lost* or *mislaid*, and *never intended* to be destroyed; for the intention of the testatrix in favour of the plaintiff and his wife, continued unaltered to her death. There is no ground then to presume that the will was ever cancelled; but the strongest ground to presume the contrary, and therefore, *full* proof of contents of it, may safely and legally supply its loss. It is true, there is found no precedent of a will lost by accident, being established on proof of the contents; but the strong reason for it, is a sufficient authority for making a precedent, and it is supported by principles. 4 *Burn. Eccl. Law*, 174. *Swinb.* 450. 515. In the case of *Goodright v. Harwood*, (*Cowp.* 87.) although the judges were of opinion that the proof there given of the contents of a will lost, was too uncertain to operate as a revocation of a former one, yet they indirectly allowed, that more certain and precise proof would have that effect. If then, such proof

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would be sufficient for the purpose of revoking a will, it is sufficient to establish one which has been lost.

BAY, J. of the same opinion.

The jury gave a verdict for the plaintiffs, finding specially the contents of the last will, and that it revoked the former ; which verdict was afterwards certified to the court of equity, and a decree made according to it.



May Term. SHIRTLIFFE and AUSTIN against GILBERT and JOHN  
DAVIDSON.

The holder of a note of hand, who gives time for payment to the drawer, takes it upon himself, and shall not recover against the indorser.

ASSUMPSIT against the defendants, as indorsers of a note of hand for 57*l.* 10*s.* sterling. The note was one of those known by the name of accommodation notes, drawn by *Moses Sarzedas*, in favour of the defendants, who indorsed it in order to give it credit for the use of *Sarzedas*. It afterwards came into the hands of the plaintiffs, who lodged it in the *South-Carolina Bank* for collection ; but not being paid, it was, on the expiration of the third day of grace, put into the hands of *John Mitchell*, as a notary, to be protested, who called on *Sarzedas* with it. That *Sarzedas* requested of him, the notary, to wait on the plaintiffs and beg a few days indulgence, as he said he did not wish the defendants, who indorsed the note for his accommodation, should be called on for the money ; which he, the notary did, and they *agreed to give him some days for that purpose*. That, however, the money not being paid in the time proposed, the notary protested the bill against *Sarzedas*, the drawer, who had in the mean time become a bankrupt ; and then he went to the defendants, as indorsers, who refused to take it up, alleging that they would not then have

any thing to say to it ; upon which the note was protested against them as indorsers.

*Mitchell*, the notary, proved the foregoing facts, as related to him in the business ; and he said, although *Sarzedas* told him he did not wish his indorsers called on ; yet, before he called on the plaintiffs to ask for the indulgence, he called on the defendants to ask their permission to apply for a few days indulgence, but they then said they would have nothing to do with it. *Sarzedas* himself, proved, that from the time he was first called upon by the notary with the note, until he was obliged to declare himself a bankrupt, he paid upwards of 1,000% to relieve those who had indorsed notes for him ; and had the plaintiffs not given the indulgence before mentioned, he certainly would have paid the amount, rather than the defendants should have suffered for their friendly act towards him. That he understood the note came into their hands for money advanced or loaned, at the rate of *five per cent. per month* ; and therefore, of the two parties, he chose that they should suffer, rather than the innocent indorsers.

*Rutledge*, for the defendants, relied on the general law of merchants, that where *due diligence* was not used against the drawer, the indorser is not liable ; but particularly on *Tindal v. Brown*, (1 Durn. & East, 137.) that wherever the holder gives a *new credit* or *time for payment* to the drawer, the indorser is exonerated. Also on the case of *Scarborough & Cook v. Harris, ante*.

*The Court* unanimously of opinion, that the plaintiffs ought not to recover, and the jury returned a verdict accordingly.

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Shirtliffe and  
Austinv.  
Gilbert and  
Davidson.

*May Term.*

WINTHROP against PEPOON, OTIS &amp; COMPANY.

An action will lie on a bill of exchange protested for *non-acceptance*, although the time for payment be not expired.

The *lex loci* where the bill is drawn, is the rule both for interest and damages on bills.

ON a motion for a new trial. The case appeared to be that a bill of exchange was drawn by a partner in *Boston*, on his copartners here, at 180 days sight, for 486*l.* 11*s.* which came into the plaintiff's hands by indorsement. On the bill being presented, it was refused, and of course, protested for *non-acceptance*. On which a suit was shortly after commenced, but before the time for payment had expired.

*Ward*, for the defendants, took two grounds : 1st. That the verdict in the former trial was against the law of merchants, inasmuch as it was founded on a protest of the bill in question for *non-acceptance*; and the suit commenced upon it before the time for payment had expired. 2dly. That the jury had taken upon them to allow *ten per cent.* damages; which was neither allowed of by our act of assembly, nor any established usage or custom of trade.

N. B. The new trial was ordered in this case, not on account of any difficulty on the first part, but in order to have the point of damages established by a *jury of merchants*.

Upon the first ground, the court were clearly of opinion, that the action lay upon the protest for non-acceptance, although the time for payment of the bill was not expired. Every man, by the law of merchants, who draws a bill, undertakes by the very act of drawing that the bill shall be *accepted* and *paid*, when at maturity, agreeable to the terms of the bill. And the very end and design of a protest, is to give *notice of non-acceptance*; or, if accepted, of *non-payment*; in either event, the drawer becomes liable. And the holder, in case of a protest for non-acceptance, is under no obligation to wait till the time for payment expires; because the drawer has broke part of his original



contract, that is, that the bill should be accepted. And because also, (if the bill should even be paid when due,) the holder would lose the benefit of the *credit in trade*, which the acceptance of a bill would give him, as well as the use of the money, which he might obtain at a small discount. The obligation in every such case, would be on the part of the defendant, to shew that the bill was afterwards paid, which might be given in evidence by way of mitigation of damages. But in this case, no payment, even at this day, is alleged ; therefore, the plaintiff is entitled to a recovery. *Doug. 55. 3 Will. 17. Kyd, 17.*

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v.  
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& Company.

Upon the second point, the court had some doubts about the *quantum* of damages which ought to be allowed. Our act of assembly for ascertaining damages on protested bills of exchange, allows *fifteen* per cent. on all bills returned from foreign countries beyond sea, with the difference of exchange ; and *ten* per cent. on bills returned from any of our sister states ; but it is silent as to the damages to be recovered on bills drawn, either in a foreign country, or in any other state, and sent for recovery in our courts in *Carolina*, as in the present instance. Therefore, in the former trial, the court left it to the jury, either to govern themselves by the reason and analogy of our own state law on the occasion, (which they thought a good rule,) or to make the *lex loci*, or law of the place where the bill was drawn, their guide, if they could ascertain what that was. Accordingly, the jury found ten per cent. damages, which is the same as allowed on bills drawn here, and returned protested. As the parties, however, expressed a dissatisfaction at this verdict ; and as it was a *new case*, the court had directed a new trial, before a special jury of merchants, who were now finally to settle this point ; and therefore left it again to the jury now sworn, either to make our law on the subject their rule, or the law and customs of the state of *Massachusetts*, where the bill was drawn, as they thought most agreeable to the law of merchants.

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The jury then retired, and next morning returned their verdict for the amount of the bill with interest, and *three* per cent. damages, agreeable to the custom of merchants in *Boston*, on inland bills protested.

This, therefore, may be considered as establishing the law on this point, and making the *lex loci*, or law of the place where the bill is drawn, the rule.



### SASPORTAS against JENNINGS and WOODROP.

Duress of goods will, under some circumstances, avoid a man's note or bond.

The question of prize or no prize belongs exclusively to the admiralty. The courts of common law have nothing to do with it. If so, then all other matters springing incidentally out of such a question, belongs exclusively to the admiralty also. A condemnation of captured goods in some court of competent jurisdiction is absolutely necessary before the property can be devested out of the original owner.

CASE on a demurrer. The defendants shipped a quantity of rum on board the *British* sloop *Bell*, of *Jamaica*, bound to *Charleston*; which sloop, on her passage, was captured by a vessel acting, or pretending to act, under a commission from the *French* republic, and brought into the port of *Charleston*. The rum was afterwards ordered to be sold for the benefit of the captors, as lawful prize, by Mons. *Mangourit*, the *French* consul residing here. Previous, however, to this, the defendants had put in their claim for the rum, as being *American* citizens, and the *bona fide* owners of the rum, which was refused. At the sale, the defendants were the purchasers, and gave their notes to the plaintiff, as agent of the captors, for the amount of the sales, and by this means repossessed themselves of their property, so captured. When these notes became due, the defendants were advised not to pay them, on the ground that they were, *in fact, compelled or obliged to give them*, in order to get back their property out of the hands of the privateersmen.

The action was then commenced. The defendants put in a special plea, stating the *duress* of their goods, and a compulsion to give these notes, in order to regain possession of their property. And further, that this court had no jurisdiction of the cause, as it naturally involved in it

the question of *prize* or *no prize*, which exclusively belongs to the admiralty jurisdiction. To this the plaintiff *demurred*; and for cause of demurrer alleged, that *duress* of goods (which, however, he denied in this case) would not avoid so deliberate an act as the giving these notes; and that this was a contract cognisable by a common law court, and not of admiralty jurisdiction. The defendants *joined in demurrer*. So that two questions came before the court for their consideration.

1st. Whether *duress* of goods would avoid a man's act or not? 2. Whether this court would take cognisance of the cause, originally of admiralty jurisdiction?

There was however a third point, and the most material of any, though not submitted by the pleadings, and which naturally arose out of them; which was, 3. Whether, upon a supposition that this court cannot take cognisance of a case which originally and exclusively belongs to the admiralty jurisdiction, it will of a matter incidentally springing out of it?

On behalf of the plaintiff, it was argued, on the first ground, that *duress* of goods will not avoid a man's deed; because the party may have adequate satisfaction in damages, for any injury he may receive; and for that purpose the counsel relied on 2 *Inst.* 483. and 1 *Black Com.* 431. That, however, in the present case, there was no kind of *duress* but a voluntary contract at a public sale, where the law was open for redress of every kind of injury whatever. The defendants were perfectly free to contract for the rum, or not, as they thought proper. There was no *compulsion* on them; no *threats*. Every step respecting the contract, and giving the notes in question, was the result of deliberation and free will. That it was unnecessary to go into the consideration of a note of hand; it carried with it upon its face a *valuable* consideration, and no construction whatever could draw it into the admiralty jurisdiction. It was a contract cognisable in the common law courts only, and not elsewhere. That the rum in question, had been taken on the high seas, and had been upwards of twenty-

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four hours in the hands of the captors, which divested the original owners of their property, so that they could have no further interest in it. And although there had been no regular condemnation, yet that only respected the distribution of capture, not the divestment of the original owners. That the defendants, therefore, could have no claim to the rum in question; and if no claim, then they could not even have an equitable pretext for detaining the money in their hands, under colour that they had no other mode left to regain their property.

2. On the second ground, the counsel did not contend that this court could take notice of a prize cause, or one of admiralty jurisdiction; but denied that this was a question of prize or no prize, or an incident springing out of it. That it did not appear to be a cause of this kind, from the face of the proceedings.

*For the defendants*, it was replied, that *duress* of goods would avoid a man's deed in some particular instances; for the necessities of a man might, in many cases, be so urgent and pressing, as not to admit of the ordinary modes of redress by due course of law, however able the other party might be to make him compensation, or to satisfy him for any injury he might sustain; and relied on *Astley v. Reynolds*, (2 Str. 916.) where a pawner of goods paid 6*l.* more than was really due to the pawnee, and upon an action of *assumpsit*, recovered it back again; because it was said, this payment was by compulsion, and the plaintiff could not do without the plate pawned; so that an action of trover would not do for his business; therefore it must have been paid by the plaintiff relying on his remedy to recover it back again. From whence the counsel in this case urged, if *assumpsit* would lie to recover back money paid under the circumstances as in *Astley v. Reynolds*; that if a demand was made for money supposed to be due under similar circumstances, the defendants might defend themselves against so unjust a claim. That the situation and calling of the captors, made it more urgent and necessary in this case, than perhaps in any other which could occur,

to induce the defendants to regain their effects by any possible means short of force, out of their hands. They were *privateersmen*; the very import of the term was sufficient to convey an adequate idea of them: transient persons, not one of whom might ever be found again here, after once leaving the port; or if found not worth a shilling to make reparation in damages. This case, therefore, was much stronger than any mentioned in the books, and fully justified the defendants in not paying the notes thus given for their goods, so illegally detained from them. As to force, they had none at command, to oblige the captors to relinquish; and if that were practicable, it might endanger the peace of the country; whereas the present mode was a peaceable one, which prevented every thing like hostility, and was fully sufficient for every purpose they wanted.

2. On the second ground it was clear, they said, that a court of common law could not take cognisance of a prize cause. All the writers on the laws of nations, concurred on this head and laid it down as a well established rule, that the question of *prize* or *no prize*, must be determined by the *jus belli*, and belongs exclusively to the prize court, in the admiralty jurisdiction. That the reasoning was so strong in the case of *Leceaux v. Eden*, (*Doug.* 572.) that it was unnecessary to mention any other; nay, the plaintiff himself, conceded the point.

3. On the third point, the defendants' counsel contended, that although the notes were not (abstractly considered) a matter of admiralty jurisdiction; yet, as they incidentally sprung out of the capture, and was a consequence of it, and the money mentioned in them, depended upon the determination of the previous question of prize or no prize, it was such an incident attached to a prize cause, as could not be severed from it, without manifest injustice to the defendants. That the notes in question, were only *evidences of the contract, made to get back the rum into the defendants' possession*; which contract, however, whether good or

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bad, binding or nugatory, still depended on the right of property in the rum. For if the rum was still the property of the defendants, any contract made to pay for what was their own, was void and of no effect. On the contrary, if it was in the captors, then they were bound to pay; which still brought the grand question back to the consideration of prize or no prize? That even if the rum had been the property of enemies, instead of friends and neutrals, there must have been a condemnation in a court of competent jurisdiction. (*Lindo v. Rodney.*) Here was no condemnation or investigation in a court competent to decide upon it; it was sold by the arbitrary order of the *French* consul. That with regard to the effects of this sale, it might well be compared to the case of pirates, who took goods at sea, and *sold them on land*; where it was adjudged to belong to the admiralty jurisdiction. For that which is an incident to the *original matter*, shall not take away the original jurisdiction. *Doug.* 583. That the opinions of the judges in the case of *Leceaux v. Eden*, (*Doug.* 579.) were also clear on this point. That where the injury was the *natural consequence of the capture*, the admiralty has the sole and exclusive jurisdiction. That where the admiralty has *exclusive jurisdiction of the matter*, it ought to have jurisdiction of *every thing necessarily incident to it*. And that if the original taking *be not a trespass cognisable at common law*, it leaves it with *all its incidents*, to the court which has *original jurisdiction*. From all which authorities and opinions, it was sufficiently clear, that whatever was an incident to a case of admiralty jurisdiction originally, should be tried by the admiralty, and not by a court of common law.

*The Court* (present, BURKE, WATIES, and BAY, Justices) took time to consider this case; and after mature deliberation, were of opinion that this court had not jurisdiction of the cause. That with regard to the first point submitted by the pleadings, they were decidedly of opinion, that there might be cases where *duress* of goods would avoid a man's act; and that there was nothing from 2 *Inst.* 483.

and 1 *Black.* 131. to the contrary. Both Lord *Coke* and Judge *Blackstone* lay down the principles of law generally, without recurring to exceptionable cases out of the general rule. The very reason they assign, appears to confirm this opinion. They both say that *duress* of goods will not avoid a man's deed; *because* the party injured may have adequate satisfaction in damages for the injury. This then obviously presupposes two things: 1st. Ability in the person or persons to make recompense. 2dly. A prompt and effectual method to compel this satisfaction. But where these essentials are wanting, the reason ceases, and with it, the principles on which the law was founded. Had either of these great sages of the law contemplated, in the cases quoted, the inability of persons to make compensation, or a want of a speedy tribunal to compel it to be made; they would, no doubt, have laid down principles applicable to such cases, and that too, very different from those relied on by the plaintiff's counsel. Besides, it is too obvious, that the immediate necessities of a man may be so great and urgent, as not to admit of ordinary modes of redress, however able the party might be to make satisfaction. It would, therefore, be extremely hard to say that in cases of this sort, even where the party is sufficiently able, that *duress* of goods should not avoid a man's act. The reason in the case of *Astley v. Reynolds* is very strong to this point. There, the court said the party paid his money relying on his legal remedy to recover it back again. It is clear then, that wherever *assumpsit* will lie for money extorted by this kind of *duress* of goods, a party may defend himself against any claim upon him for money to be paid in consequence of any contract made under similar circumstances.

2. As to the second point, the court said it was a very clear rule of law, that the municipal courts of a country could not take cognisance of matter which was to be determined by the *jus belli*, which was a part of the law of nations; and therefore, every thing relating to, or governed by it, must be determined by that court which has the general jurisdiction of such cases; which, by the common con-

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sent of all nations, belonged to the admiralty jurisdiction. They said *Leceaux & Eden's* case, and the authorities there referred to, together with the reasoning and opinions of the judges upon them, were so strong and conclusive upon this head, that it was needless to do more than to refer to the case itself.

3. On the third point, the court were equally clear, that the notes in question were only evidences of a contract made at a sale of the rum as a lawful prize; and therefore formed such an incident as naturally brought them within the admiralty jurisdiction, which had the original cognisance of the question of prize or no prize. It was admitted by all parties, that the rum in question, was shipped on board the *British* sloop *Bell*, as the property of the defendants, who were *American* citizens—that it was seized by a *French* privateer, brought into the port of *Charleston*, and ordered, by the *French* consul, to be sold as lawful prize; and that at this sale, the defendants purchased it, and gave their notes for the purchase-money, in order to get possession of the rum. These notes then, were evidently the last links in the chain of events, which was fastened to the admiralty jurisdiction originally, and which could not be severed from the others without the most glaring injustice to the defendants; for it must be obvious that the validity of this contract depended upon the legality of the prize. If the rum still remained the property of the defendants, there was no one principle of law or justice existing, which could make them pay for what was their own before, or which could support or defend any contract made to pay for it. If, on the contrary, the rum vested in the captors, then the contract was binding; which still involved in it the consideration of prize or no prize, and brought it back to the admiralty jurisdiction, to which it originally belonged. The case of *Leceaux v. Eden* was strong in point: that was an action of false imprisonment, brought by the second mate of a ship which was taken as a prize by the defendant, who was commander of a *letter of marque*. The ship and cargo



were afterwards liberated by the admiralty, and the captor condemned in costs and damages; upon which the plaintiff brought this action, as he had been confined on board. The action of false imprisonment was apparently a common law case, as much so as the present one on the notes of hand, appeared to be. But the court, in that case, did not sustain it; because it was an incident springing out of a cause originally of admiralty jurisdiction; and they said, that wherever the injury is the natural consequence of the capture, the admiralty has the sole and exclusive jurisdiction. The case of the pirates was also strong: there, goods were taken at sea, and sold on land; and it was contended, that this sale on land, made a contract cognisable at common law; but the court adjudged otherwise—that as the original taking belonged to the admiralty, every thing which was incidental to, or sprung out of it, should belong to it also. So in *Turner & Carey's* case, against *Nek*; (1 *Leo.* 243. 1 *Sid.* 367.) where an *Ostender* was taken for a *Dutch* ship, and brought into port, and libelled as prize; but restored to the owners. The *Ostenders* libelled in the court of admiralty, for damages which the ship sustained while in port, and a *prohibition* was prayed; but refused, on the ground that the original was a capture at sea, and the bringing into port, in order to have her condemned as a prize, is but a consequence of it; therefore, not only the original, but the consequences, shall be tried by the admiralty; so the prohibition was refused. All these cases, and many others referred to, go to establish the principal point contended for by the defendants—that whatever is an incident springing out of a prize case shall, as well as the original capture, be tried by the admiralty jurisdiction.

The court said they would take notice of one thing more in this case, lest their silence upon it might be construed into an acquiescence of the principle laid down by the counsel for the plaintiff, in the course of the arguments, and quoted from *Vattel*: “That a seizure as prize, and twenty-four hours possession by the captors, or bringing the prize into a place of safety, vested the property in the

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“captors.” (*Vattel*, 571, 572.) This, they said, was a doctrine they by no means assented to. In the case of *Linde v. Rodney*, (*Doug.* 591.) Lord *Mansfield*, in one of the most learned and elegant opinions he ever delivered in *Westminster-Hall*, as the unanimous opinion of the *King's Bench*, declares, that after searching the admiralty records from the earliest periods, and examining all the treaties and marine laws then existing, (in 1781,) the court was decidedly of opinion, that no property vests in any goods taken at sea or land, till a sanction of condemnation. That the marine ordinances of *France*, their instructions to their captains of private ships of war, and a variety of subsisting treaties for one hundred years past, all confirm the position, that no one is to sell, or purchase, before the admiral, &c. shall have declared the ship or goods taken, to be good and lawful prize. Lord *Mansfield*, in the same opinion, says, that mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of all nations, have established a system of procedure, a code of laws, and a court for the trial of prize or no prize. After all these authorities, and the reason of the thing itself, which appears to be a part of the acknowledged law of nations on the subject, a bare dictum of *Vattel*, that twenty-four hours possession vests the property in the captors, however respectable his authority may be in other respects is not of sufficient weight to justify the position contended for; especially, when it is recollected that he borrowed the idea from *Grotius*, who wrote about two centuries ago, when commerce and navigation were extremely circumscribed indeed, and when mercantile transactions were very little known, and less attended to by those who had the direction of national transactions. Besides, as a very ingenious author observes, “both *Puffendorf* and *Grotius* are of too foreign a cast, to be admitted of general use at this day. “They are too much mixed up with the civil law and the “customs of *Germany*, to answer the present exigencies of “trade, or extension of commerce.” A variety of treaties,

conventions, and customs, have been introduced since, by the modern commercial nations, in favour of trade, and their mutual intercourse with each other ; that the law of nations has almost entirely changed from what it was two centuries ago. If this doctrine should really prevail, and be considered as the general law of nations at this day, no property at sea would be safe ; it would all be in the power of captors, to be disposed of at pleasure, without regard to the rights of neutrals, friends, or fellow-citizens. How could the property of persons of this description be distinguished, ascertained, or reclaimed, unless there was some tribunal of competent jurisdiction to investigate and determine the right ? How could those rights be protected, or the faith of treaties observed, without some mode of examination, or power to compel restitution ? Such a doctrine, as has already been observed, would really lay every thing prostrate on the ocean, at the mercy of armed vessels and ships of war. An investigation, therefore, in a court of competent jurisdiction, to adjudge and condemn what is lawful prize, appears from the best authorities, and wisest regulations of nations, to be absolutely necessary, before the property can be divested out of the original owner. Upon the whole, the court were of opinion, that the demurrer in this case ought to be sustained, which will injure neither party ; but leave the question of prize or no prize, with all its incidents, to the admiralty, which had the original jurisdiction of the cause, and among them, the contract in question.

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Sasportas  
v.  
Jennings and  
Woodrop.

*May Term.*ADAM and WILLIAM TUNNO *against* ROGERS and  
M'BRIDE.

Entries made  
in merchants'  
books, must  
be proved by  
the clerk who  
made them, if  
in the state.

THIS was an action of *assumpsit* for goods sold and delivered. Some part of the entries in the plaintiffs' books, were made in the hand-writing of Mr. *Monk*, who was absent in *Orangeburgh* district. On the plaintiffs' offering to produce proof of *Monk's* hand-writing, an objection was taken to it, as *Monk* himself was in the state, and within the reach of the process of the court, it not being the highest evidence of which the case was capable ; which objection,

*The Court* sustained, as coming within the rule of law laid down in the case of *Fosters v. Sinkler, ante*.

*May Term.*ROUFLE *against* M'CARTY.

In all special  
actions for  
selling an un-  
sound negro,  
where the  
case is doubt-  
ful the jury  
ought to sup-  
port the con-  
tract.

THIS was a special action on the case, for selling an *un-sound* negro female slave.

The evidence was extremely doubtful, whether the un-soundness stated, was the effect of disease before or after the sale.

*The Court*, (present WATIES and BAY, Justices,) therefore, took this opportunity of mentioning that these kind of actions had become very frequent of late ; as it often happened that as soon as a purchaser got tired or disappointed in a bargain, he would then set up a pretext of this kind for recovering back his money. That juries had been very much in the habits of giving in such verdicts as had a tendency to rescind sales entirely, instead of making a reasonable abatement in the price so as to do justice to both

parties, without setting aside a bargain. They, therefore, recommended to the jury to consider seriously of this case, and not to slide too easily into a practice that really rendered almost all sales uncertain. They further laid it down as a good general rule, that wherever the case was a doubtful one, as the present, it was better to support contracts, than to vitiate, or set them aside.

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Rouple  
v.  
M'Carty.

Verdict for defendant.

CROSKEYS *against* O'DRISCOLL.

May Term.

SLANDER. The words were, that the defendant said the plaintiff harboured his negro, and he would prove it. The jury gave *three pounds damages*, subject to the opinion of the court, whether these words were *actionable*, or not?

*The Court*, after hearing counsel, were unanimously of opinion, that these words were not in themselves actionable, and as no *special* damage was proved, that the verdict ought to be set aside.

All the judges present.

The Executors of BREWTON *against* The Executors of  
CANNON.

It is a good general rule, that non-payment of interest on a bond for twenty years, is presumptive evidence that it has been paid off.

Though the circumstances of a revolutionary war and confusion, will alter it, which is proper for the consideration of a jury.

THIS was an action of debt on bond, commenced in *Washington* district. No payment had been made on the bond for upwards of 24 years. BAY, J. who tried the cause, directed the jury to find for the defendants, as the law presumed it had been discharged, there being no payments indorsed on it within the above period. That it was a rule of law that twenty years elapsing without any payment being made on a bond, is presumptive evidence that it has been paid off. He relied on the authority of *Espinasse's Nisi Prius*, 254. also, 1 *Burr.* 434. and the jury found accordingly.

And now a motion for a new trial was made by

*Trezevant*, on the ground of misdirection. He argued, that although the reason and authorities will support such a doctrine in *England*; yet, it is not applicable to the situation and circumstances of this country. It was well known, he said, that various acts, from the time of the provincial congress in 1775 and 1776, till the instalment law in 1789, had all operated to prevent the recovery of debts. That the circumstances of the war, and distresses of the citizens which sprang out of it, prevented them for many years, from paying off their debts; while many indulging creditors, on the other hand, from principles of compassion, refrained from pressing for their demands. All these things, he contended, so materially altered the situation of this country, that the reasons and principles would not apply with justice here, which were applicable to the circumstances of an old country, where riches abound and regularity prevails.

*Per Curiam.* It is a good general rule, and no doubt, good law, that if no interest has been paid on a bond for twenty years, it shall be presumed to be satisfied; and in such case, the defendant may plead *solvit ad diem*, and rely on the presumption. But war, and the variety of distresses occasioned by a revolution, alter the situation of a country greatly; and therefore, all these circumstances should have been permitted to have gone to a jury, to judge whether the presumption was so strong as to warrant them to find for the plaintiff, or not.

BAY, J. assented, after argument, on account of the peculiar circumstances of the country, during and for some time after the war; though, on the trial, he conceived himself bound by the rules of law laid down in the books.

1795.

Executors of  
Brewton  
v.  
Executors of  
Cannon.

GIBBES *against* WAINWRIGHT.September  
Term.

ON a return of the *scire facias* issued in this case, *Fraser*, as plaintiff's attorney, moved for a judgment, as no cause was shewn to the contrary.

*Pringle* opposed the motion, as being made too soon, and urged, that the defendant was entitled to an imparlance at least of one term, as a matter of course; it having been the practice (he said) of the court for several years past. But

*Per Curiam.* Although the gentlemen of the bar may have indulged one another in such a practice; yet it is not a matter of right, either by the common law, or any rule of this court. By the common law, imparlances are allowed in the original action, for the purpose of affording the defendant an opportunity of defending himself against the plaintiff's claim. But after judgment, that right or claim

An imparlance, as a matter of course, ought not to be allowed on a *scire facias*; but may, upon some special cause shewn for that purpose.

The plaintiff is entitled to his execution, on judgment being signed, and ought not to be delayed, as in the original action.

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Gibbes  
v.  
Wainwright.

is fully established. So that any further delay would be to deny the plaintiff a right which the common law gave him ; as it was very apparent from the very nature and terms of the judgment. Indeed, nothing but a *release*, *payment*, or some kind of *composition*, &c. subsequent to the judgment, can be pleaded to a *scire facias*. Whenever any thing of that kind is pleaded, the court will, on cause shewn, give the defendant an opportunity of establishing it ; and will, if necessary, allow of an imparlance ; but never will as a matter of course in every case.



September  
Term.

KENNEDY against RAGUET.

The death of an absent debtor, after attachment issued, will not vitiate the proceedings against the garnishees, who make default in not returning, on oath, what effects they have in their hands, &c. From and after such default, the goods in their hands are liable.

CASE on attachment. The plaintiff, *Kennedy*, having a demand against the absent debtor, *Raguet*, attached his property in the hands of Messrs. *Conde* and *Doughty*, as *garnishees*. The garnishees made no return to the attachment ; by which means, they admitted effects in their hands sufficient to pay the plaintiff's demand, who proceeded to judgment against them, and issued out his execution for levying the amount. About the time, or immediately after, the issuing of the execution, it was discovered that *Raguet*, the absent debtor, had died a short time before at *Bordeaux* ; consequently, before the signing of the judgment against the garnishees, and the issuing out of the execution.

*Pringle*, on behalf of the garnishees, moved for setting aside the judgment and execution against *them* ; alleging that the attachment suit against the absent debtor, had abated by his death previous to the entering up of this judgment ; and that it followed of course, that if the original suit abated, all its concomitants, and every right under it, fell with it. That the great end of the attachment act was to make the absent debtor a *party in court*, so as to



*charge his goods after judgment*; but if he died before judgment, then his goods would go over to his representatives, or be cast on the ordinary.

*Pinckney*, in reply, contended, that the great end of the attachment act was *to charge the effects of the absent debtor*, and not his *person*. That it was a proceeding *in rem*, and not *ad personam*. The moment garnishees made default in not making a return on oath, they admitted effects in their hands sufficient to pay the debt. *They*, and not the absent debtor, from that moment became the real defendants. It was immaterial to them whether the absent debtor was dead or alive; whether they paid over the money to him, his representatives, or the plaintiff in the action. All that was necessary afterwards, was to prove the plaintiff's demand, and then *they*, and not *Raguet*, became chargeable; *they* owed the money, and it did not lie with them to plead in abatement. That it was well established law, that wherever you proceed against a *thing*, and not against the *person*, it is immaterial whether the *party lives or dies*. *Gilb. Hist. Com. Law*, 242. That where the death of the party happens during the pendency of the writ, *which makes no difference in the plea*, the suit should not abate. In the present case, the death of *Raguet* made no difference in the *plea*, which was *effects or no effects*. All the plaintiff had to do, if a plea had been put in, would have been to shew that they *had* effects. As no plea was filed, or put in, he had only to *prove his debt*; this he did, and the garnishees were liable. That with regard to *landed* property, he admitted it might have been otherwise; because, by the statute of *frauds*, it is only bound by a *judgment*.

*Per Curiam*. The death of *Raguet* makes no difference in this case, if it happened *after default made by the garnishees*. The policy and design of the attachment act is to make the *effects* of the absent debtor *liable, wherever found*. The garnishees had a right to come in and deny they had effects; or if they had, that they had a right to retain as

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Kennedy  
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Raguet.

*creditors in possession, or the like, &c.* But as they did not make any such return, they thereby admitted effects to be in their hands sufficient to satisfy the plaintiff's demand, and *then they* became *liable*, and from *thenceforth*, they ought to be *considered as defendants*. If the death of the absent debtor had happened before any return was, or could be made, then the doctrine urged in support of the motion might have applied ; but as the case now stands, the plaintiff's claim against the garnishees remains unimpeached. Therefore, let the rule for setting aside the proceedings be discharged, and the plaintiff have leave to proceed against the garnishees.



September  
Term.

FOLTZ against MEY.

If a note be originally fair, and not usurious, no intermediate usurious transaction shall affect it in the hands of a subsequent fair holder, not privy to such usurious business.

THIS was an action by the plaintiff, as indorsee of a promissory note, against the defendant, as drawer. The note was drawn by the defendant, in favour of Mr. *Khone*, who indorsed it, in order to lodge it in the bank ; and was afterwards entrusted to the nephew of the defendant, to deposit in the *South-Carolina Bank* for discount. This nephew, instead of obeying his uncles orders, negotiated the note with one *Hart*, at a discount of *five per cent. per month*, in order to raise money on it for his own account. It afterwards came into the hands of the plaintiff, *Foltz*, for a valuable consideration ; against whom nothing usurious was alleged.

*Pinckney* and *Rutledge* endeavoured to carry back the usury to the original making of the note by *Mey*, and contended, that if there was the remotest idea of raising money on it upon the above terms, it would make it usurious ; and if so, then it would be affected in the hands of an innocent holder, who might even know nothing of the usury. 1 *Esp.* 40. 42. *Ibid.* 259. 2 *Durn. & East*, 230. *Cowp.* 970. &c.

*Pringle*, contra, contended, that although in the transaction between the defendant's nephew and *Hart*, the transaction was obviously usurious ; yet, if the note was not drawn by the defendant for that purpose, it was good and valid in its creation. In this case it had been clearly proved, that the note was drawn and indorsed for the express purpose of being lodged in the bank, to raise money at the usual bank interest ; therefore, fair in its origin. That no after breach of confidence, or improper conduct in the nephew, ought to affect it in the hands of an innocent holder for a valuable consideration, unless a knowledge of the intermediate usurious transaction could be attached to him.

1795.

Foltz  
v.  
Mey.

WATIES, J. The note in this case appears to be fair in its creation or making ; made for a legal purpose in the course of trade, and came fairly in the course of trade into the hands of the plaintiff. No intermediate *contingencies* or *usurious transactions* between *other* persons, through whose hands it may have passed, can affect it in the hands of an innocent indorsee. Between him and the drawer it clearly stands unimpeached.

BAY, J. concurred, and the jury found a verdict for the plaintiff.

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The STATE against ARDEN.

September  
Sessions.

THE prisoner was indicted, together with one *Campbell*, for the murder of a *Spanish* seaman by the name of *Jewets* ; and, at her particular request, was tried separately. *Campbell* was convicted of *manslaughter*, but the prisoner of *murder*. On the adjournment day of the sessions, when she was brought up for sentence,

*Trezevant* moved in arrest of judgment, on the ground that if one be indicted for murder, and another as accessory,

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The State  
v.  
Arden.

and the principal is convicted of manslaughter, that the accessory shall be discharged. He cited to this point 1 *Hale*, 437. where it is said, if *A.* be indicted for murder, and *B.* accessory, and *A.* be found guilty of manslaughter, *B.* shall be discharged. Also, 1 *Hale*, 116. to the same point:— if *A.* be indicted of murder, and *B.* as accessory, and the jury find *A.* guilty of manslaughter, there shall be no inquiry of *B.* afterwards. Likewise, 2 *Hawk.* 447. where it is said that if a man is found guilty of manslaughter, those accused as accessories, before or after the fact, shall be discharged. So again in 1 *Hale*, 137. if a man be indicted for manslaughter, with accessories, the indictment as to accessories is void. Also, *Cro.* 546. 1. From these authorities, he urged, that as *Campbell*, who was a principal, had been convicted of manslaughter, the prisoner ought to be discharged.

*The Attorney-General*, in reply. There are two counts in the indictment, in both of which *Campbell* and the prisoner are charged as principals, and not as principal and accessory alternately, as her counsel has supposed. In the first, *Campbell* is stated to have murdered the deceased with a club, or stick, by severe beating, and that the prisoner was *present, aiding and assisting*. In the second, the prisoner is charged with murdering the deceased, by stabbing in the throat and breast with a pair of scissors, and that *Campbell* was *present, aiding and assisting her*. So that they are both charged as principals in both counts. It is true, the old law admits of principals and accessories, *at the fact*; but by modern improvements of our criminal jurisprudence, and as it now stands, there may be accessories *before and after* the fact, but none *at the fact*; they are *all principals*. 2 *Hawk.* 312. *Foster*, 347. Even under the first count, the prisoner might have been convicted of murder as an *abettor*, and *Campbell* only of manslaughter, according to the malignity of the offenders, and the deadly weapon made use of by each respectively. For it is laid down in 2 *Hawk.* 312. that if there be *malice* in the *abettor*,

and none in the person who struck the party, it will be murder in the *abettor*, and manslaughter only as to the other. It is the *malicious intention* which constitutes this offence, and makes the essential difference between *murder* and *manslaughter*. For although two be aiding and assisting in killing another, yet, if one engage on a sudden quarrel or heat of passion, without any previous malice or ill will, and the other, while the parties are engaged seeks that opportunity of *taking revenge*, or of gratifying a malicious disposition, and gives the *deadly blow*, it is murder in the latter, although only manslaughter in the former. But in the second count she is charged as the principal in the first degree, and not as an abettor, and the jury were to judge whether she was a principal or an abettor, according to the nature of the evidence offered them. In either case, if there was *malice*, it constitutes the offence of murder. The jury have found it so; there is no averring to the contrary; and the court is bound by the finding of the jury.

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The State  
v.  
Arden.

The Court (present BURKE, GRIMKE, WATIES, and BAY, Justices) unanimous that the motion in arrest of judgment should be overruled, as the prisoner had been indicted as a *principal* in both counts of the indictment, and the jury were to judge of the *malicious intent*, of the degrees of guilt in the parties, and to apply the evidence to the different counts as they thought proper.

The prisoner was then asked if she had any thing to offer why sentence of death should not be pronounced against her? Upon which she pleaded *pregnancy*. Whereupon she was remanded to gaol; and the sheriff was directed to summon a jury of matrons, *de ventre inspiciendo*. The court then adjourned from day to day, till the inquisition was found. It was then returned by the sheriff into court, under the hands and seals of twelve matrons, in which they certified that they had examined the prisoner,

Pregnancy may be pleaded by a woman, after conviction, before sentence of death is passed upon her; which shall be tried by a jury of matrons.

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v.  
Arden.

and found that she was not pregnant. The prisoner was then brought up, and received sentence of death, and was afterwards executed pursuant to the sentence.

September  
Term.

## ROULAIN against M'DOWALL.

A jury may give damages for the detention of the debt, beyond the amount mentioned in the obligation.

A verdict may be amended from the judge's notes.

THIS was an action upon a single bond, for 150*l.* which was given in part consideration for a tract of land. There was, however, a condition to this bond, that if the defendant would build a house of certain dimensions, mentioned in the condition, within a certain time, it should be accepted in lieu of the above sum of 150*l.*

The plaintiff declared in the usual form on the bond, and laid his damages at 20*l.* On the trial it was admitted that the sum of 150*l.* was *bona fide* due, and that it was not inserted by way of penalty ; and further that the house agreed to be accepted in lieu of it, had not been built. But it was insisted on for the defendant, that the plaintiff could not recover more than the sum mentioned in the bond. That he must recover *in numero*, as the debt was ascertained and fixed,

GRIMKE and BAY, J. who tried the cause, were of opinion, that this was in nature of a single bill, and not a penalty for performance of covenants ; and that the jury, therefore, although confined to the sum mentioned in the bond, yet they might give damages for the detention, if they thought it proper and reasonable, to the amount laid in the declaration,

The jury found accordingly for the plaintiff, 170*l.* but in their verdict did not distinguish between the debt, 150*l.* and the sum of 20*l.* as damages for the detention,

A motion was afterwards made to set this verdict aside, as against law. But

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Roulain  
v.  
M'Dowall.

The Court (present BURKE, WATIES, and BAY, Justices) were clear in opinion, that the jury acted right in finding damages for the detention of this debt to the amount laid in the declaration; and indeed, if the damages had been laid to a higher amount, they might have gone as far as would have covered the legal interest due on the debt. But that they ought to have severed and found the *damages distinct* from the *debt*. *Bull.* 178. 1 *Esp.* 306, 307. *Say. on Dam.* 63. Lord *Raym.* 773.

Trezevant, for the plaintiff, then moved for leave to amend the verdict from the judge's notes, as it was obvious that the jury intended the sum of *twenty pounds* as *damages for the detention*; and for this purpose, 2 *Str.* 1197. 2 *Burr.* 899. 1. 1 *Will.* 33. *Hen. Black. Rep.* 78. and 3 *Morg.* 104, 105. were all relied on as in point.

This was accordingly done from the notes of BAY, J. who sat at the trial.

Motion to set aside the verdict discharged.



THE STATE against GORDON.

September  
Term.

ON a motion to *set aside a judgment*, and to have a *new trial*, after a *scire facias* to revive the original judgment.

The bond on which the original suit was commenced, was given for the defendant's *amerciament*, upon his being taken off the *confiscation* law, and judgment was entered on it in 1789. It lay over from that time, till a *scire facias* was issued to revive the judgment. And now, on the re-

to apply for a new trial on return of *scire facias* to revive a judgment of six

Giving a bond extinguishes *prior* simple contracts. No new trial will be granted for discovering evidence which might have been procured at the trial. It is too late years stand-

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turn of the *scire facias*, the defendant's counsel moved for leave to set aside the judgment, and for a new trial, on sundry affidavits which they produced, stating as the grounds on which they relied, First, that the defendant could not procure evidence at the time of trial to support a good discount which he had against the state, for provisions and sundry articles taken off his plantation, for the use of the *American* troops during the war, which amounted to more than his amercement. Secondly, that at that time, (to wit, in 1783,) there had been no precedent of such kind of discount having been allowed against the state, as was held to be a good one in *Gaillard's case*, tried in 1792. (h) Thirdly, that unless the defendant was allowed a new trial, he could not substantiate his discount, and of course, would be remediless; as by the amendment of the constitution, an individual could not sue a state.

(h) *Vide post*,  
492. which  
case should  
have been  
first in order.

*The Court* (present BURKE, WATIES, and BAY, Justices) were unanimously of opinion, that a new trial ought not be allowed. First, because the bond was given many years after the discount originated, which was during the war; and it is a maxim in law, that a specialty or bond, extinguishes all simple contracts between the parties. Secondly, that it was a clear rule of law, that no new trial can ever be granted for the discovery of evidence, which, by due diligence, might have been had at the trial; and the more especially, as *Postell*, on whose affidavit the defendant so much relied, lived in the country, and might have been *subpœnaed*. That, thirdly, it was too late, after a lapse of six years, to come in and move for a new trial, even if the cause was good in common cases; that it would be a dangerous precedent to set aside judgments after so great a lapse of time; there would be no security in them, if they might be set afloat after a tacit acquiescence for so many years. And lastly, that it was a well known rule of law, that upon a *scire facias*, or *audita querela*, nothing could be pleaded which might have been made a ground of defence.



in the original action ; it must be something subsequent to the action.

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The court were also of opinion, that *Gaillard's* case, so much relied on, was not applicable to the present. *Gaillard* never gave a bond for his amerciamment ; but always refused it, on account of his claim against the state, for rice and other things taken from his plantation for the use of the *American* army ; and when sued for his amerciamment under the act, he came forward with his discount, and established it ; and the jury, under the direction of the court, allowed it, and he had a verdict in his favour. It is probable that the present defendant might also have had a verdict in his favour, had he refused to give his bond, and have come in with his discount at the trial ; but it was now too late.

Motion discharged.



PURVIS against ROBINSON and others.

TRESPASS to try title to a tract of land, before WATKINS, J. at Cambridge, in November, 1795.

The plaintiff claimed under a grant to himself, which the defendants admitted ; but they gave in evidence an elder grant of the same land to one *A. Robinson*, who having neglected to pay the office fees, and purchase-money due on it, the land had been sold by the commissioners of the treasury, under the act of assembly, and bought by the defendants. The deeds of conveyance to them, from the commissioners had been duly recorded, and they produced a certified copy of them. It was required by the plaintiff's counsel that the original deeds should be produced and proved by the subscribing witnesses ; but it was contended

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on the other side that the act of assembly (*Pub. Laws*, 133.) dispensed with this proof after the deeds were recorded, and made a record or an office copy, equivalent to it ; and that it had been so determined by the CHIEF JUSTICE at the last court.

WATIES, J. said he had always given a different construction to the act ; and that it appeared to him that the intention of it was only to make a record of a deed, or an attested copy of such record, good evidence, where the original was lost. He added the following reasons :

By the 7th clause it is expressly declared, that “ where  
“ any person has lost his original deed by accident, the re-  
“ cord thereof in the secretary’s, or register’s office, together  
“ with the actual possession of the party claiming under the  
“ same, shall be deemed good evidence of a title at law, un-  
“ til better evidence appears.” The 30th clause does in-  
deed say, “ that the records of deeds duly proved before a  
“ justice of the peace, and also attested copies thereof, shall  
“ be deemed to be as good evidence in the law, and of the  
“ same force and effect as the original would have been  
“ in all courts of law and equity.” But if one clause is  
construed by the other, (which the rule of law requires,) then the latter can only mean, like the former, that the record of a deed, or attested copy of such record, shall supply the loss of the original. This is explicitly declared in the first ; and even in the last, it seems to be strongly implied by the expression “ as the original *would have been*.” The legislature could not have intended so inconsistent a thing, as to make the record, or official copy, inferior evidence by one clause, and the highest evidence by another ; nor could it have intended so mischievous a thing as to overturn an important rule of evidence, and make a copy equal to an *existing* original. This would be giving great facility to fraud. If by recording a deed, the necessity of producing it was dispensed with, then the proof of its validity would rest on the *ex parte* oath of one of the subscribing witnesses, before any justice of the peace, and without any

examination. It would be very easy, by this means to conceal, under the fair dress of a record, the foulest features of fraud manifest on the face of the original, and to give even to a forged deed, all the effects of a valid one. This could not have been the intention of the act. It is much more probable that the deed and the record were considered of different degrees; if the first should be lost by accident, then the second, or an attested copy, may supply it; but if the first is in existence, it is the highest evidence, and must be produced. This construction is not only consistent with the rest of the act, but also with the established rules of evidence; and it is more reasonable to presume that the legislature intended to respect these, than to violate them. The evidence therefore offered here, must be considered as inferior evidence, and is only admissible upon proof that the original deeds have been lost by accident.

As the defendants offered no proof of such a fact, the court refused to admit the certified copy of the deeds, and a verdict was found for the plaintiff.

The counsel for the defendants gave notice that he would move for a new trial, on the ground of misdirection of the judge; and this motion was accordingly made at *Columbia*.

*All the judges* were present, and after full consideration, BURKE, GRIMKE, and WATIES, were of opinion that a record, or official copy of a deed, was not made the highest evidence by the act of assembly, but only suppletory evidence upon the loss of the original. They admitted that the general practice hitherto had been otherwise, but that the act, when fully considered, did not warrant it; for it did not appear to intend any alteration in the rules of evidence, but only to provide a more certain and authentic mode of supplying the loss of deeds.

BAY, J. of a contrary opinion, thought the 30th clause of the act quoted, was intended to alter the rules of the common law with respect to office copies of deeds, &c. from the time of passing the act, and to make them evi-

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dence in our courts from that period, without any proof of the loss of the originals ; provided such originals had been duly proved before a justice of the peace, in the usual method, before they were recorded. The words are these, " That the records of all grants in the office of the said " auditor-general, or his deputy ; and the records of all " grants and deeds, *duly proved before a justice of the peace,* " *in the usual method,* and recorded, *or to be recorded,* in " the register's office of the province ; and also the *attested* " *copies thereof,* shall be deemed *to be as good evidence in* " *the law,* and of the *same force and effect* as the original " would have been, *if produced,* in all courts of law and " equity."

This clause appeared to him to be framed in such unqualified terms, as to admit of no other construction ; and this construction had been given it, as he understood, (with perhaps very few exceptions to the contrary,) ever since the law passed in 1731 ; for which reason, he did not think himself at liberty to give his assent to the alteration of a practice which had so long prevailed in this country, and which had proved so convenient to its citizens. That the 7th clause of the act would be found, upon an attentive perusal, to have a retrospective operation, and was obviously intended only to cure defects, or to provide against losses or accidents, which happened before the passing of the act ; and therefore, it enacts, that in all such cases, where the originals could not be procured, office copies should be deemed good evidence. It goes still further, and declares, that in cases where no record could be found, the oath of the party of the loss of such original, should be deemed *prima facie* evidence of a right, so as to entitle him to a new grant for the land ; which further confirms the idea of the retrospective operation of that clause. Whereas the 30th clause is partly retrospective, and partly prospective, and enacts, that all deeds recorded, and *to be recorded thereafter,* in the register's office, and all attested copies of them, shall be as good evidence as the originals. There is no condition, or *proviso,* requiring proof of the

loss of such originals as were to be recorded in future ; all that the clause appears to require, as necessary, is, that such originals should be proved before a justice of the peace before they are recorded.

It was therefore ordered, that the rule be discharged ; but having afterwards considered the great hardship of the defendants' case, who had trusted to the practice which before prevailed, they consented that there should be a new trial, in order to give the defendants an opportunity of producing their original deeds, and proving them by the subscribing witnesses.

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The Executors of HUGER *against* BOCQUET.\*

DEBT on three bonds, all dated the 21st of *April*, 1774 : one bond for 2,000*l.* currency, payable the 1st of *July*, 1774 ; one do. for 7,000*l.* do. 1st of *April*, 1775 ; one do. for 7,000*l.* do. do. 1776.

This matter turned upon the depreciation law. Sundry receipts were produced for sundry sums paid on account of these bonds, from *March*, 1775, to *January*, 1780, amounting together to upwards of 16,000*l.* currency ; and the point in dispute was, whether these payments should be carried to the credit of all the bonds, generally, which would leave them as one entire contract, or to the credit of the two first, (which would thereby become extinguished,) and the balance, after being depreciated, to the credit of the third bond ?

For the defendant, it was contended by *Pinckney* and *Rutledge*, that the payments ought to be applied to the extinguishment of the two first bonds, in the first place ; and the residue, after being depreciated, to the credit of the third

Where money is paid on account of three bonds, generally, and more than enough to pay off the two first, those two shall be considered as extinct, under the depreciation law, and the balance shall be carried to the credit of the third.

\* This case was omitted among those of 1792.

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bond and interest, as far as it would extend; and that the plaintiffs would then be entitled to a verdict for the balance, and no more. That to settle it in any other manner, would make an amazing difference in the sum now really due, as the whole of the contracts would then remain unsettled, and the payments must be depreciated; whereas, to settle it in the manner they insisted on, would be extinguishing the two first contracts, and would leave only the third and last, a subsisting one. This, they further contended, was agreeable to the nature and order of things, that the bonds first due, should be paid off first, and the one due at the latest period, last. That he *who pays the money*, has a right to *direct* the application of it; or to what purpose it ought to be applied; and for that purpose quoted 1 *Esp.* 357. *Cro. Eliz.* 68. They further quoted *Wane and Wade's* case; the case of *Fitzsimons v. Ashe*; *Whippy v. Ashe*; and *Chisolm v. Gillon*; in all which cases the courts had determined agreeable to these principles.

*Pringle*, for the plaintiffs, contended, that the bonds bearing all the same date, and for one entire purchase, could be considered as only one contract, although payable at different days; and if any part remained due, the whole was to be considered as a subsisting contract at this day, and ought to be settled accordingly, after giving credit for the payments, agreeable to the depreciation law. He relied on the case of *Murphy v. Thompson*, at *Georgetown*, where two bonds out of four, being paid off, a suit upon the third bond was dismissed, as more than two-fifths, under the instalment law, were paid off. He also contended that the case of *Wade and Wane* was not the opinion of the court, only the fluctuating opinion of a jury, which might be contradicted by another jury.

*By the Court*, unanimously. (Present, the CHIEF JUSTICE, BURKE and BAY, Justices.) The payments ought, in the first place, to be applied to the extinguishment of the two first bonds, and the balance to the credit of the last bond. The case of *Murphy v. Thompson*, quoted from *Georgetown*,

was a case under the instalment law, and respected the commencement of a suit, when it was alleged two-fifths of the original debt had been paid off; but it did not go to the extinguishment of any part of the debt under the depreciation law. The case of *Wane* and *Wade* had been determined by a special jury, on very just and legal principles, and all the other cases quoted by the defendant's counsel, have confirmed the doctrine ever since.

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The jury found the two first bonds paid off, and carried the balance of payment to the credit of the last bond.

**BAYLY against LAWRENCE.\***

**COVENANT** for rent in arrear, brought on a lease of a ship-yard at *Hilton-Head*, for 10 years, dated the 6th of *June*, 1774. Defence—that the defendant was driven off by the casualties of war, and deprived of the enjoyment.

Resolved, *Per Cur.* That the defendant ought to pay for the time he peaceably enjoyed the premises, but not for any time he was prevented by the casualties of war.

Where a tenant is dispossessed by an enemy, he ought to pay rent only for the time he peaceably enjoyed, and not for the time he was prevented by the casualties of war.

\* This case was omitted among those of 1792.

The STATE *against* GAILLARD.\*

Under the amerciament act, although the defendant is precluded from recovering any thing against the state, unless his account is delivered in in time: yet he can defend himself against the state, to the amount of his discount.

CASE for 12 per cent. on the defendant's estate, under the amerciament law.

Discount pleaded to the whole of the demand, for sundry articles taken for the use of the *American* army, during the war.

To which it was objected, that as *Gaillard* had not given in his account to the commissioners, within the time mentioned in the act of 1785, he was now precluded from it. But,

*By the Court.* Although the defendant is by that law precluded from recovering any thing from the state, yet he may still defend himself against the state to the amount of its demand. He is not entitled however, to the balance which his account exceeds the demand of the state, under the discount law, though he is entitled to a verdict in his favour.

Verdict for the defendant, but without costs.

\* This case was omitted among those of 1792.



## The Executors of HATFIELD against KENNEDY.\*

DEBT on bond, assigned to Mr. *Rivers*. A special verdict in this case found, that the bond in question was a joint and several bond from *John Hamilton* and *James Kennedy* to the deceased *Hatfield*, and that *Kennedy*, the defendant, signed his name as *security*; therefore, submitted to the judgment of the court, whether the plaintiffs could go against the security, until the other obligor was proceeded against to insolvency. The special verdict also found, that when this bond was signed, *Hamilton* gave a mortgage of sundry negroes to secure payment, which had been assigned over to Mr. *Rivers*, with the bond in question.

*Pinckney*, for the defendant, contended, that the defendant ought to be considered in this case, only as a *collateral undertaker*, or *bail*; in both which cases, he only became liable upon the *failure* of the principal. That this must have been the obvious intent and meaning of the defendant when he signed his name as *surety*, which ought to govern; and that the very import of the term *security*, conveyed only the idea of a warranty in case of insolvency, agreeable to the civil law. 1 *Dom.* 374. 377. That at all events, as the mortgage was not foreclosed and the negroes sold, Mr. *Kennedy* was not liable till that was done, in order that he might know whether there was any, and what deficiency, to make up.

*Hall*, for the plaintiffs, insisted that the addition of the word *security*, under the *defendant's name*, to the bond, did not alter the binding nature of the bond, which was joint and several. That both were equally principals; and that there was nothing in the bond itself, or the condition, which specified that he was only a collateral undertaker, or warranted only in default of *Hamilton*, the other obligor, and that the law would warrant no such construction.

Upon a joint and several bond, the plaintiff may sue either of the obligors, at his election, though one of them sign his name as *security*. That the obligee having a mortgage for the same debt, makes no difference; for wherever the plaintiff has different remedies, he may pursue one, or all of them, at the same time; tho' he shall never have double damages. *Doug.* 401.

\* This case was omitted among those of 1793.

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But admitting, however, that *Kennedy* was only a collateral undertaker, and only liable on default of the other, yet he became liable on the day the money became due ; the moment *Hammilton* failed to pay, the obligation on his part that instant commenced ; so that even in this point of view, he became liable.

That even, according to the rules of the civil law, if sureties make themselves principal debtors (which was done in this case) they are liable. And with regard to the foreclosure of the mortgage, Mr. *Rivers*, the assignee, was not bound to go into equity, as long as he had his common law remedy, although he might have done so, if he had thought proper ; and the more especially, as he had given *Kennedy* a receipt acknowledging it was only left in pledge, and that he would return it when the money was paid.

Resolved, *by the Court*, unanimously, That the defendant, in this case, cannot be considered either in nature of a bail, or as a *collateral undertaker*, but as one of the *principal debtors*. From the very face of the bond that was apparent, as there was no clause or proviso in it which evinced such an intention ; the intent ought certainly to govern ; and as the bond is in the common form, *joint and several*, it is therefore plain that it was the intention of the parties that both obligors should be equally liable. The addition of the word *security*, under the name of *Kennedy*, could not control or alter the absolute nature of the deed ; nothing but some memorandum or agreement to that effect, could justify such a construction. Besides, this kind of addition of the word *security* is often added, in order to shew who is the real debtor, or the person who is to pay the money ; and this is very proper, as in many cases after the death of the parties, it would otherwise be difficult to know whether it was for a joint debt, or not. With regard to the foreclosing the mortgage, that was a matter entirely optional with the mortgagee or assignee ; for wherever a man has a bond and mortgage, he may pursue

Where a man has a bond and mortgage, he may pursue his remedy in equity and at law at the same time.

both at the same time, or either of them, as he thinks proper, and this, as Lord *Mansfield* says, has often been ruled over and over again. *Doug.* 401.

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All the judges present.

GWIN and Wife, late Widow of HICKS, against The  
Executor of HICKS.\*

CASE for two years rent of a plantation, 240 dollars.

The case was this: The fee of the land was in Mrs. *Hicks*, at the time of her first marriage, and Mr. *Hicks* planted it with his negroes, and died in the latter end of *May*, or beginning of *June*, after the crop was considerably advanced.

Where the fee of land is in a widow and she marries again, the crop planted by the first husband, shall go over to his executor; but for the next year, they ought to pay rent for the use and occupation.

In the winter following she married her second husband, Mr. *Gwin*; but the negroes of Mr. *Hicks* continued on the land all the remainder of the year, and the year following. This was therefore a suit brought for two years rent of the land. But,

*By the Court.* He that plants must reap; and as the life estate in the land was in Mr. *Hicks* when he planted the crop, it must go over to his executor for that year, without rent; but for the second year they ought to pay rent.

The jury found accordingly for the second year, 240 dollars—say, for 120 acres at two dollars per acre.

\* This case was omitted among those of 1793.

The Creditors of JOHN SCOTT, deceased, *against* SARAH SCOTT, Widow of the deceased.

Where the commissioners named in a writ of dower, give a widow one tract or parcel of land, in lieu of the whole of her deceased husband's estate, it is bad, and will be set aside, on application of creditors. They are bound to give her one-third of each separate tract or parcel, or to assess a sum in lieu thereof, on every parcel, unless it is agreed by the heir or creditors to the contrary.

UPON a claim of the widow for dower.

In this case a petition for dower had been presented on behalf of the demandant, Mrs. *Scott*, and a writ for the admeasurement of it had gone out to certain commissioners, in the usual form, commanding them to admeasure unto the widow, and assign her dower in several tracts of land described, some of which were lots in town with buildings thereon; others consisted of lands in the country. The commissioners had executed and returned the commission, stating that they had assigned, and put the plaintiff in possession of a house and lot in *Broad-street*, in lieu of her dower in all the lands which belonged to the deceased.

And now at the adjournment day of *May* term, 1791,

*Read* moved that the return of the commissioners might be confirmed and made final: Whereupon,

*Pinckney* on behalf of the creditors of the estate of the deceased Mr. *Scott*, who apprehended that there would be a deficiency in the estate for the payment of the debts, took exceptions to the proceedings of the commissioners, and moved that the return might not be recorded, until the objections on behalf of the creditors were heard and decided upon by the court.

The objections were that the commissioners ought to have assigned the dower out of each tract, and not to have taken *the most valuable part of the estate*, and given that in lieu of the whole, (as this was stated to be.) That in so doing, they had very much impaired the value of that lot out of which the whole dower was assigned, and rendered it unsaleable and unproductive, being encumbered with her life estate. He contended that they had no right to do this, under the

act which authorised them either to assign dower in the common way, or to assess a sum of money (if they found the other to be inconvenient) for and in lieu of her whole dower.

*Read*, for the plaintiff, argued, that the court could not take notice of the creditors of *Scott's* estate, because they had no privity of estate, or interest in the lands; their claims were against the executor in respect to the assets in his hands. He further urged, that the powers of commissioners, under the act of assembly, were large and extensive; that they are made the sole judges between the widow and the heir, touching the quantum of dower; that they are to proceed upon the view, and that their decision is declared to be "*firmly binding and conclusive between the parties.*" He compared the present with sundry cases in which dower had been assigned by the heir in the same way as the commissioners have assigned in this case, and which had been supported by the court. He further observed, that the assigning of dower out of every house and every tract, would be much more likely to render the property unsaleable, by loading each with a life-estate, to the great inconvenience of the purchaser.

*Pinckney*, in reply, contended, that the creditors of the estate, and particularly the judgment and execution creditors, who held an immediate lien upon the whole estate, were competent parties in this case. That this assignment went immediately to impair their remedy, and the court would take notice of them. That the lands in fact belong to them, and not to the heir, until the debts are paid. The commissioners, he said, came in lieu of the sheriff, who was the proper officer at common law, to admeasure and assign dower—and, like him, are liable to have their proceedings set aside, if they be contrary to law. To shew that the demandant in dower is to have a third part of each tract or parcel, and not one tract or part of a tract, "in lieu of her dower in all," he cited *Co. Lit.* 32. 6. He in-

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sisted that dower stood on the common law footing ; that the act of assembly had made no alteration. Cited also 2 *Black.* 136. that dower must be set out with *metes and bounds*, a third part of each parcel ; also, *Co. Lit.* 33. 6. The creditors, he said, were willing she should have her ample dower ; but that it should be according to law. That they had a right to insist upon this, as the estate was insolvent, and ought so to be marshalled, that the creditors may lose as little as possible.

RUTLEDGE, Ch. J. and BAY, J. As this is a new case, and is to form a precedent, it therefore ought to be solemnly decided. We will consult the other judges, and give our opinion on the return day. We have, however, no doubt at present as to one point, which is the right which the creditors had to be heard on the point, the estate being conceded to be insolvent ; in which case they stand in the place of the heir at law.

On the return day, the court considering the novelty and magnitude of the case, ordered the great question, to wit, whether the commissioners could assign the whole dower out of one tract, to be argued again next term.

The case was afterwards fully argued by

*Pinckney* and *Ford*, for the creditors ; and

*Read* and *Pringle*, for the demandant. After which

RUTLEDGE, Ch. J. delivered the opinion of the court to the following effect : The act of assembly makes no alteration as to the mode of assigning dower ; because the words of the act follow the words and form of the judgment, and *habere facias in dower at common law.* *Lilly's Entries*, 270. 598. *Lit.* 3. 36. 2 *Black. Com.* 129. 2 *Bac. Abr.* 118. The act indeed, gives the commissioners a power to relinquish the admeasurement of dower altogether, and of assessing a sum of money in lieu thereof. But one or the

other, must be pursued solely ; and no other composition can be made unless by consent. The commissioners then, (if they undertook to admeasure dower at all,) stand in the place of the sheriff at common law.

At common law, where the husband is sole seised, dower must be admeasured off, *per metas et bundas*. 1 *Roll. Abr.* 682. 2 *Bac. Abr.* 135. But it may be otherwise assigned *by consent*. So also, *Viner Abr.* tit. *Dower*, p. 256. pl. 1, 2, 3. also, 257. pl. 12. So also a bad assignment may be rectified ; and a *scire facias* will lie to assign, *de novo*, p. 258. pl. 17. p. 260. pl. 12. The latter shows that the court has an equitable power of directing the apportionment of dower. Also in the same page, (Y. pl. 4.) it is shewn that an endowment of one manor out of three, is against *common right* ; and in p. 261. (Z. pl. 1.) it is said, that the sheriff cannot assign against *common right*.

Common right gives the widow but one-third of each tract. *De quocunque tenementis tertia pars*. *Co. Lit.* 33. 6. *Moor.* pl. 47. 66. Also, *Dyer*, 137. In 3 *Comy.* tit. *Dower*, (p. 131.) it is said the widow shall not be endowed of entire tenements. So in *Co. Lit.* 35. a. If there be several feoffees, and one assign dower for all, the others cannot take advantage of it. If the thing out of which the widow be dowable at common law, be divisible, her dower must be set out *per metas et bundas* ; but if it be indivisible, then she must be endowed specially—as of the third presentation of a church—the third toll-dish of a mill—the third part of the profits of an office, &c. 2. *Black.* 136.

The act of assembly in this state was made, not to vary the right to dower, but to institute a more easy and certain mode of obtaining it. From the peculiar situation of this country, and the great disadvantage, sometimes to all parties, that may attend the dividing of a plantation, the commissioners are vested with powers to assess a sum of money, not as dower, but in lieu of dower. Where they do this, their return is indeed final, because they are made the judges of the value of the property.

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But it would be exceedingly dangerous, if they possessed the power of giving a part of land in lieu of all the rest. Dangerous to the widow ; for they might assign her an entire tract in some remote and uncultivated part of the state. Dangerous to purchasers ; for they might lay the burthen of all her dower upon those lands only which had been sold by her husband, and exonerate the heir from all incumbrance. In such case, it would be impossible for any man to know, or for counsel to advise him, how far the claim of dower might, at a future day, affect the lands he was purchasing. Instead of the widow taking her life-estate in one-third, the commissioners might assign her two-thirds, perhaps a larger portion still. With regard to the competency of the creditors in the present case to be admitted as parties, it is certain that lands being subject to judgments and executions, the creditors stand in the place of the heir, and possess his interest, which is always subject to their debts. If this were not so, the heir and widow colluding together, might always defeat the remedy of creditors. They might get dower assigned in those lands only which are subject to the debts, and the creditors would have no remedy against the lands that had been antecedently sold by her husband, though they might be equally subject to her dower. By this means the innocent creditors would bear all the burthen of the widow's dower. She has her remedy against purchasers, (where she has never renounced,) and can compel them all to contribute to her claim ; but the creditors have no such right : their judgments bind only the lands that were unsold when the judgments were obtained. To refuse, therefore, to entertain these claims of creditors would be to open a wide door for fraud and injustice.

Upon the whole, therefore, the Court is of opinion that the commissioners have not pursued the terms of the law, or the powers given them by the writ of dower, by selecting the most valuable part of the property, and giving it to the widow in lieu of the whole ; but that they ought to have



given her one-third of each separate tract, or assessed a sum in lieu of the same. Whereupon it was ordered that the proceedings of the commissioners be set aside; and that a new writ of dower do issue.

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[N. B. The words in Judge WATIES's opinion, "*if he appears to have known of it; nor unless he prove that he gave a valuable consideration for it,*" are to be omitted, being inserted through mistake; as he never intended to annex such conditions to his opinion]

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Personal chattels may be limited over as well as real estates, provided such limitation has not a tendency to create a perpetuity, or an estate tail; and therefore, in a will where negroes were devised to children, with this proviso or condition, "But if either of my daughters should die without a lawful heir of their body to live; then, to be equally divided among the survivors." This was held to be a good executory devise to carry over the property to the surviving children. And that the words "*heirs of their body to live*," ought to be construed child or children *living at the time of her death*: consequently not too remote, but within the reasonable bounds the law intended, 82

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Where a person, by deed of gift, gave sundry negroes to her daughter, without the control of her husband, "*and at her death, to the heirs of her body*;" this limitation was deemed too remote, having a tendency to create an estate tail; consequently, the whole vested in the first taker, 453

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## M

### MANDAMUS.

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### MASTER AND SERVANT.

Master of a ship may give a mariner moderate correction, if he refuse to do duty or misbehave. So may any other master correct an unruly or disobedient servant; a tutor, his scholar, &c. *Ibid.*

### MERCHANTS.

The clerk who makes the original entries in a merchant's books, must prove them, if he is within the state. But if he be dead, or without the limits and jurisdiction of our courts, then evidence of his hand-writing may be given, 480  
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as not being sufficient to support his case, he shall not have that privilege afterwards, but must submit to the verdict of the jury, 107

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NULLUM TEMPUS, &c.

*N B.* In the case of *Lessee of Allston v. Saunders*, tried at *Cheraws*, in 1786, the court avoided giving an opinion on this principle, but ordered a new trial, on the ground that the court had refused to admit evidence which was proper for the consideration of the jury, 26

*Vide tit. Evidence; also, tit. Possession.*

But in the case of *Lucas v. Owens*, the judges delivered their opinions at *Columbia*, in 1806, that no length of possession will bar the state of its right to lands; though a great length of possession may be given in evidence of the presumption of a grant which may be lost by time or accident.

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*N. B.* The above case has been contradicted by a late decision, where it has been determined that an office copy of a deed, &c. duly recorded, is not as good evidence as the original; but that such original must be produced, if in the party's power, or the loss of it, before such copy can be given in evidence, 493

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